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Supreme Court, U.S.
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Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Arkansas Supreme Court in the present matter affirmed certification of a sweeping nationwide class action involving millions of class members' state law claims without first requiring any choice of law analysis. The Court recognized that the issue it faced — whether constitutional principles required a choice of law analysis before certification of a nationwide class — was an issue of first impression in Arkansas. The Court also recognized that its decision to certify the nationwide class, without requiring any choice of law analysis, was in direct conflict with decisions in other states.

The question presented in this petition is whether a state court's refusal to consider choice of law before certifying a nationwide class action that is predicated upon varying state laws fails to give full faith and credit to the laws of sister states and deprives litigants of due process by injecting arbitrariness into the proceedings.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is General Motors Corporation. Respondent is Boyd Bryant, both individually and as the representative of a plaintiff class. The nationwide class certified below is as follows:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in Hat parking brake system utilizing a high force spring clip retainer, that registered his vehicle in any state in the United States.

Petitioner, General Motors Corporation, has no parent corporation. State Street Bank and Trust is the only publicly held company which owns 10% or more of General Motors Corporation's stock.

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Petitioner, General Motors Corporation ("GM"), respectfully prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Appendix ("App.") at 1a) is not yet reported in the official reporter, but it is reported at *General Motors Corp. v. Bryant*, 2008 Ark. LEXIS 413 (Ark. June 19, 2008), and *General Motors Corp. v. Bryant*, 2008 WL 2447477 (Ark. June 19, 2008). The opinion of the Circuit Court of Miller County, Arkansas (App. at 36a) is unreported.

JURISDICTION

The opinion of the Arkansas Supreme Court was entered on June 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Due Process and Full Faith and Credit Clauses of the United States Constitution. The Due Process Clause reads: "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const., Amend. XIV, Section 1. The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each state to the Public Acts, Records and Judicial Proceedings of every other state." U.S. Const., Art. IV, Section 1.

STATEMENT OF THE CASE

This case involves the deprivation of due process rights to litigants in a sweeping nationwide class action with at least four million class members because the state court certified the class without first conducting any choice of law analysis. As a result, the state court certified the massive class without any understanding of what facts and legal issues would be relevant as a matter of law to the class certification decision. Had choice of law been addressed, a class could not have been certified because the vastly differing laws of all 50 states and the District of Columbia would have applied, thereby defeating the basic class certification requirements such as "commonality" and "predominance."[1] Thus, the state court's certification decision was not merely error, it was arbitrary in the extreme and, consequently, constitutionally infirm.

1. Factual Background

The motor vehicles at issue are pickup trucks and utilities purchased between 1998 and the present date. They were manufactured at five different plants, for three different GM divisions, at various points over a

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[1] Ark. R. Civ. P. 23, governing the requirements for a class action in Arkansas state courts, is based on and is effectively identical to Fed. R. Civ. P. 23, governing the class action requirements in federal court. Under Ark. R. Civ. P. 23(a) and (b), a class can be certified only if the class is "numerous," there are "common" questions of law or fact, the representative parties claims are "typical," the representative parties will "adequately" protect the class, the common questions "predominate," and a class action would be "superior."

four year period. In late 2000, GM noticed a higher than expected warranty experience with regard to the parking brakes in some of the vehicles. Working with the National Highway Traffic Safety Administration ("NHTSA"), GM concluded that some of the vehicles could develop a condition that might lead to premature park brake wear. Once GM ascertained the source of the potential wear issue in 2002, it developed a warranty repair for any vehicles experiencing a problem.

In its analysis performed for NHTSA, GM concluded that there were no means to predict whether any specific vehicle would experience the condition. Only two percent of the automatic transmission vehicles had required parking brake warranty repairs and these warranty figures varied depending on the model, year, month of build, type of model, and individual consumers usage and maintenance practices.

GM, with NHTSA's approval, issued a recall for the manual transmission vehicles in April 2005. This decision followed a NHTSA study where NHTSA noted that the parking brakes were designed solely "to supplement" other parking mechanisms (such as the "park" function on automatics and the reverse gear on manuals). However, NHTSA's study found that the manual transmission vehicles had a higher chance of a roll-away incident than similar vehicles manufactured by GM's competitors. The same was not true for the automatics, and thus, the automatic transmission vehicles were not recalled.

Boyd Bryant ("Mr. Bryant"), an Arkansas resident, purchased a 2002 Chevrolet Tahoe, with automatic

transmission, from a dealership in Ashdown, Arkansas, on April 4, 2002. The dealer explained to him the recommended maintenance schedule, including periodic inspections of the parking brake. However, between September 2002 (when a warranty repair was available) and mid-2004 (when his warranty expired), he did not have an inspection or service of any type performed and, thus, passed up an opportunity for the warranty repair.

2. The Class Certification Proceedings

After responding to a legal advertisement in a newspaper, Mr. Bryant filed this nationwide class action on February 4, 2005 in the Circuit Court of Miller County, Arkansas. He sought to represent a class of original and subsequent owners of approximately four million 1999 through 2002 pickups and utility vehicles sold in every state in the nation and the District of Columbia from 1998 through the present date. Mr. Bryant alleged that the parking brakes in these vehicles might prematurely fail. For causes of action, Mr. Bryant asserted five state-law based claims: (1) breach of express warranty; (2) breach of implied warranty; (3) violation of the Magnuson-Moss Warranty Act;[2] (4) unjust enrichment; and (5) fraudulent concealment.

On July 17, 2006, Mr. Bryant filed a motion for class certification. He never provided the circuit court with

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[2] The Magnuson-Moss Warranty Act in 15 U.S.C. §2301, *et seq.*, is a federal statute, but it simply incorporates the state law warranty standards that would otherwise be applicable. *E.g., Clemens v. DaimlerChysler Corp.*, 534 F.3d 1017, 2008 U.S. App. LEXIS 15949, *5-6 (9th Cir. 2008); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986).

any analysis of the state law or laws that should be applied to the millions of class members' claims. By contrast, GM argued that (1) the choice of law analysis in a nationwide class action involved due process and full faith and credit considerations, (2) the choice of law analysis had to be undertaken before certification, (3) under Arkansas choice of law principles, the laws of all 51 jurisdictions would apply, and (4) the certification requirements of commonality and predominance could not be satisfied if the laws of all 51 jurisdictions were applied.

After the parties each submitted draft findings of fact and conclusions of law with regard to class certification, the circuit court signed Mr. Bryant's version without any changes on January 11, 2007. App. at 36a-111a. The class certified by the circuit court was:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in Hat parking brake system utilizing a high force spring clip retainer, that registered his vehicle in any state in the United States.

Id. at 66a. With regard to the choice of law issue, the circuit court said "it would be premature for the Court, at this stage in the case, to make the call on choice of law." *Id.* at 91a. "[N]ow is not the time to decide whether the laws of multiple states will apply." *Id.* at 93a. Even though the circuit court had not examined what facts and legal issues would be relevant as a matter of law, it

concluded that a nationwide class could be certified because there were two common issues, under no particular law, for a classwide trial – whether the millions of vehicles had a "defect" and whether the defect was "concealed." *Id.* at 70a, 95a. The circuit court additionally determined that, after conducting a classwide trial on these two allegedly common issues in what the court called a "phase I" proceeding, a staggering array of individual issues for the millions of claims would then be tried over an undefined period of time in "phase II." *Id.* at 95a-99a (phase II would include, by way of example, whether a class member gave the required pre-suit notice, when a warranty expired, liability regarding leased vehicles, statute of limitations, whether GM had a duty to disclose to any given class member, reliance, and damages).

GM appealed the certification ruling directly to the Arkansas Supreme Court pursuant to Ark. S. Ct. Rule 1-2, and GM briefed the same choice of law issues that it had raised before the circuit court. The Arkansas Supreme Court affirmed the certification order in all respects on June 19, 2008. App. at 1a. It recognized that it was faced with a "question of first impression" in Arkansas – namely, "whether an Arkansas circuit court must first conduct a choice-of-law analysis before certifying a multistate class action." *Id.* at 11a.[3] The Court also recognized that many courts in other jurisdictions had previously determined that choice of law must be examined prior to certification. *Id.* at 12a-

[3] The Court acknowledged that GM "contends that a choice-of-law analysis must be conducted prior to certification" due to "due-process considerations." *Id.* at 6a.

13a. However, the Court declined to follow that approach and instead said that Arkansas courts need not conduct a choice of law analysis before nationwide certification because it would constitute a "rigorous analysis"[4] and a "merits" inquiry that would be inappropriate in Arkansas. *Id.* at 13a-14a. It also agreed with the circuit court that two alleged common issues – the existence of a "defect" and "concealment" of the defect – could be tried on a classwide basis before trying the individual issues. *Id.* at 9a, 12a. The Court did not address how "defect" and "concealment" could be common when no determination had been made about what facts and legal standards would be relevant as a matter of law to any class member's trial of those issues.

REASONS FOR GRANTING THE PETITION

I. A NATIONWIDE CLASS CERTIFICATION ORDER THAT FAILS TO ADDRESS THE CONSTITUTIONAL ISSUE OF CHOICE OF LAW IS REVIEWABLE BY THIS COURT.

This Court reviews "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. § 1257(a). The Arkansas Supreme Court squarely rejected GM's argument that due process principles, as set forth by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), require a choice of law

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[4] The "rigorous analysis" requirement was established by this Court in *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982) (certification should be granted only if a court first conducts a "rigorous analysis" of the certification standards).

analysis before certification of a nationwide class. *See* section II.A., *infra*. That decision is final and cannot be revisited. As a result, there is no recourse, other than in this Court, to address the current situation — where a nationwide class has been certified by a fundamentally arbitrary process and millions of class members now must go through the constitutionally mandated notice and opt out process, and make binding decisions about their *res judicata* rights, when no one can yet tell them what their rights are. And, because the decision is now the law in Arkansas, it threatens the due process rights of litigants in other cases.

The imminent notice and opt out process highlights the need for this Court's immediate review. Like Fed. R. Civ. P. 23(c), Ark. R. Civ. P. 23(c) requires that the certified class must now receive "the best notice practicable under the circumstances," which notice must define the "class claims, issues or defenses," provide an opportunity for class members to "request[] exclusion," and explain "the binding effect of a class judgment on class members." As discussed in section II.A., *infra*, notice is an essential due process requirement and, because the governing legal standards here are undefined, class members are deprived of the opportunity to make an informed decision about whether to opt out. Moreover, GM is exposed to a classwide trial on millions of claims when, even if GM were to prevail, the trial could be subject to collateral attack by the absent class members due to the constitutionally deficient notice and opt out process.

Even if the Arkansas Supreme Court's decision were deemed interlocutory because it only resolved the

federal issues, and left non-federal issues for future proceedings, this Court has adopted a "pragmatic approach" in determining whether such state court decisions are subject to review under 28 U.S.C. § 1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). This Court is not bound by whether the state court deems the order "final." *Id.* at 479 n.8. Indeed, *Cox* recognized there are "at least four categories" of cases that are subject to review even when further proceedings remain to be held in state court. *Id.* at 477. This Court's flexible approach to determining jurisdiction is necessary to avoid "the mischief of economic waste and of delayed justice." *Id.* at 478.[5]

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[5] *Cox* found jurisdiction appropriate in several types of situations that are relevant here: where "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another, the federal issue is conclusive or the outcome of further proceedings preordained"; where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings"; and where failure to review the issue "might seriously erode federal policy" because "the party seeking review might prevail on the merits on nonfederal grounds." *Id.* at 479-80, 482-83. In the present matter, from a practical perspective, the Arkansas Supreme Court's ruling will never come before this Court again as discussed below, and certainly not on the issue of whether constitutional principles require that choice of law be addressed prior to certification. Even if GM were to prevail on the merits on remand, that determination could be subject to collateral attack by absent class members as a result of the failure to have conducted the pivotal choice of law analysis at the certification stage. Yet the choice of law issue is essentially determinative here because, had a choice of law analysis been required, certification would have been denied due to the significant variations among the laws of the 50 states. *See* section II.C., *infra*.

Taking a "pragmatic approach" to the specific circumstances in the present matter, the Arkansas Supreme Court's opinion is ripe for review now. This case could never realistically make its way back to this Court because of the phased trial plan approved by the Arkansas courts – effectively backloading all issues of significance into potentially thousands or even millions of individualized trials to be conducted after the classwide trial. The initial phase would try the alleged common "defect" and "concealment" concepts and a second phase, or more, would consist of trials on the individualized issues that the circuit court recognized would need to be resolved before providing judgment to any of the millions of class members. As the circuit court described the procedure:

> [Phase II would] include, without limitation, whether an individual class member provided notice; when, if at all, a class member's warranty expired due to mileage; the type of ownership a given class member possesses (*e.g.*, purchase versus lease); and limitations-related issues. Warranty damages . . . can also be addressed during a "phase II" trial . . . The more individualized issues of whether GM owed a given class member a duty to disclose or whether a particular class member relied on GM's failure to disclose can be reserved for a "phase II" trial. The issue of damages can also be reserved for "phase II." . . . Finally, the equitable division of the disgorged sum amongst deserving class members can be reserved for a "phase II" trial.

App. at 97a-99a. This procedure is clearly not possible, and even were it possible, it would take countless years to complete.

Moreover, the reality is that the certification of a class creates tremendous settlement pressure. The certification decision itself often compels capitulation by some defendants unwilling to risk potentially huge liability given "the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes" the defendant. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (Posner, J.).[6] The pressure can exist "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Class certification certainly enhances the value of unmeritorious claims, by making it more likely that defendants will be found liable for higher damage awards, and this is particularly true in a nationwide class

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[6] *See also* 15B Charles Alan Wright et al, *Federal Practice and Procedure* § 3914.19, at 56 (2d ed. 1992) ("Certification may impose enormously expensive burdens, and may make settlement imperative or impossible."); Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 Nw.U. L. Rev. 704, 705 (1997); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995); Joseph Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 963, 973 n. 38 (1994); William Simon, *Class Actions – Useful Tool or Engine of Destruction*, 55. F.R.D. 375, 389 (1972).

action.[7] Because the stakes are so high, an arbitrary certification process that denies the litigants fundamental due process rights calls for immediate review.

Finally, where important due process rights are at issue, like they are here, this Court has traditionally accepted review even when significant, additional state court proceedings are anticipated. The vindication in *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977), of a right not to be forced to defend an action on the merits when jurisdiction was grounded solely on an improper seizure of property could not have been accomplished if the improper trial had to be conducted in order to seek review of this Court. Likewise, protection against undue assertions of personal jurisdiction, as in *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984), would be significantly diminished if one had to undergo the defective procedures in order to challenge them. *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 47-50 (1987) (Sixth Amendment rights); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (arbitration preemption); *Rush v. Savchuk*, 444 U.S. 320, 324 (1980) (quasi in rem jurisdiction). The rights at stake here are at least as fundamental.

This Court should grant review of the Arkansas Supreme Court's ruling. The federal question regarding the constitutionality of the state court's proposed

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[7] *See Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987)); Kenneth S. Bordens and Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989)).

adjudication of millions of claims in a nationwide class without reference to or regard for applicable law is significant. Where federal policies affecting the scope and form of litigation are at issue, it serves the underlying policy of finality to determine now what due process rights are required rather than to subject the litigants "to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *see also Southland Corp.*, 465 U.S. at 7-8 (noting that delayed review of a state decision denying enforcement of an arbitration contract would defeat the core purpose of a contract to arbitrate).

II. THE FAILURE TO CONDUCT A CHOICE OF LAW ANALYSIS BEFORE CERTIFYING A NATIONWIDE CLASS ACTION VIOLATES THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES.

Due process and full faith and credit principles require the determination of the applicable law or laws in a nationwide class action predicated upon state law prior to certification. The substantive law is the lens through which every aspect of the certification decision is to be viewed because it defines the legal and factual questions raised by the class members' claims. As a result, courts necessarily must tackle the choice of law issue at the certification stage by "determining on an individual basis which state has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

The Arkansas Supreme Court's decision to ignore the choice of law issue offends the constitutional notion of fundamental fairness. It adds a standardless dimension to the class certification equation, and it frustrates the justifiable expectations of the parties by injecting arbitrariness, uncertainty, lack of notice, and unfair surprise into the proceedings. "A choice of law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice of law decisions under the Due Process Clause." *Hague*, 449 U.S. at 327 (Stevens, J., concurring).

A. Choice of Law Must be Analyzed Before Certifying a Nationwide Class.

This Court addressed choice of law in the context of a nationwide class action in the *Shutts* case. There, the state court at least had made a choice of law decision, albeit one that this Court determined was arbitrary. Here, the state court's choice of law approach was even more arbitrary by refusing to address it at all.

Shutts was a class action brought by a group of 28,000 royalty owners who lived in all 50 states. 472 U.S. at 799, 801. The plaintiff class attempted to apply the law of Kansas to all of the class members' claims in order to facilitate certification of a nationwide class, but this Court rejected that effort. *Id.* at 814-23. This Court made clear it was a violation of the Due Process and the Full Faith and Credit Clauses for a state law to be applied to a class member's claim unless the state had "significant contact or aggregation of contacts" to the

claim. *Id.* at 818. *See also Hague*, 449 U.S. at 310-11 ("if a state has only insignificant contact with the parties and the . . . transaction, application of its law is unconstitutional"). This Court held in *Shutts* that these constitutional considerations require that the state law to be applied to each class member's claim must be "neither arbitrary [n]or fundamentally unfair." 472 U.S. at 821. "When considering fairness in this context, an important element is the expectation of the parties." *Id.* at 822. *Shutts* emphasized that "constitutional limitations [on choice of law] must be respected even in nationwide class actions." *Id.* at 821. Constitutional limitations on the choice of law are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions" sought to be adjudicated. *Id.*

This Court subsequently confirmed the central importance that the choice of law analysis plays in ensuring due process *during the certification process* in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the "differences in state law" were, indeed, so significant as to indicate that the claims were not predominant and the class action vehicle not superior, rendering the class unfair and unmanageable. *Id.* at 624 (referencing *Shutts*). Accordingly, this Court affirmed the Third Circuit's decertification of a settlement class for several reasons including, specifically, because the trial court failed to "apply an individualized choice of law analysis to each plaintiff's claims." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (referencing *Shutts* and noting that "constitutional limitations on choice of law apply even in nationwide class actions"), *aff'd*, 521 U.S. 591 (1997).

As noted, the present case involves an even more fundamental problem than *Shutts*. The state court in *Shutts* made a choice of law decision – an arbitrary one. The Arkansas Supreme Court went one step beyond that by making the arbitrary decision to ignore choice of law altogether. It simply assumed, without examining choice of law, that two slivers of some of the elements of the state law claims – defect and concealment – must be common across the millions of class members. But as discussed below (*see* section II.C., *infra*), that assumption is incorrect inasmuch as state laws vastly differ on even these concepts. The Arkansas Supreme Court's choice of law approach is "so vague and open ended to the point where [it] risk[s] arbitrary results." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring). Similarly, it offends the constitutional notion of fundamental fairness as a result of "the inconvenience and expense involved, . . . the idea of unfair surprise, . . . the anticipation of an improper choice of law, and . . . general notions of the limits of a state's rightful sovereignty." *In-flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 (6th Cir. 1972) (quoting Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 Univ. of Ill. L.F. 533, 535).

The predicament the parties now face with the required class notice is just one example of the arbitrariness resulting from a failure to require a choice of law analysis before certification. As noted above in section I, Ark. R. Civ. P. 23(c) requires, as does Fed. R. Civ. P. 23(c), that all class members must be provided with "notice" that defines the "class claims, issues or defenses" and the opportunity to opt out of the class.

This Court has made abundantly clear that notice and opt out procedures are a matter of due process since class members will be bound by any final judgment. *Shutts*, 472 U.S. at 812; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974). "The essence of due process is that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1103 (5th Cir. 1977) (citation and quotations omitted). *See also Berardinelli v. General Am. Life Ins. Co. (In re Gen. Am. Life. Ins. Co. Sale Practices Litig.)*, 357 F.3d 800, 804 (8th Cir. 2004) (stating, in the context of a class action, that "[t]he most important element of due process is adequate notice."). Notice requires that the class members' "substantive claims must be adequately described" and that class members have opportunity to receive "information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *Nissan*, 552 F.3d at 1104-05.

Without knowing the substantive law or laws that control any class member's claims, class members cannot make an informed judgment about whether to remain a member of the class. The Arkansas Supreme Court's ruling has the effect of forcing class members to effectively gamble by making them guess at the substantive rights at issue and whether those undefined rights should be subjected to *res judicata*. It also has the effect of forcing GM to trial, on millions of claims, that class members could collaterally attack on the ground that notice was constitutionally insufficient. "[T]he class-action defendant has a great interest in

ensuring that the absent plaintiffs' claims are properly before the forum." *Shutts*, 472 U.S. at 809. GM must be assured that if it prevails at the classwide trial, then it will not thereafter be subjected to claims by class members who argue that the notice and opt out process was constitutionally defective.

B. The Split Among the Courts on This Important Issue Should Be Settled.

Although this Court has emphasized the importance of choice of law in ensuring due process, this Court has yet to speak directly to whether a choice of law analysis is constitutionally required at the certification stage. Numerous lower courts have concluded, under the principles enunciated in *Shutts*, that a court considering the certification of a nationwide class has the duty to examine the potential legal variations at the certification stage.[8] Other courts have taken a contrary

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[8] *In re St. Jude Medical, Inc.*, 425 F.3d 1116,1120 (8th Cir. 2005) (class certification reversed because due process clause and full faith and credit clause require an individualized choice of law analysis before certification); *In re Prempro Products Liability Litigation*, 230 F.R.D. 555, 561-62 (E.D. Ark. 2005) ("Not only must the choice-of-law issue be addressed at the class certification stage — it must be tackled at the front end since it pervades every element of [Rule]23" and "in nationwide class actions, choice-of-law constraints are constitutionally mandated because a party has a right to have her claims governed by the state law applicable to her particular case."); *Yadlosky v. Grant Thornton, L.L.P.* 197 F.R.D. 292, 300 (E.D. Mich. 2000) ("Due process requires individual consideration of the choice of law issues raised by each class member's case before certification.") *Chin v. Chrysler Corp.*, 182 F.R.D. 448, (Cont'd)

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457 (D.N.J. 1998) (Due process requires consideration of "the choice-of-law issues . . . before certification."); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217,222-23 (W.D. Mich. 1998) ("In addressing the certification question, the Court is required to determine whether variations in state law defeat predominance . . . Indeed, the choice-of-law analysis is a matter of due process and is not to be altered in a nationwide class action simply because it may otherwise result in procedural and management difficulties."); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371-72 (E.D. La. 1997) (refusing to certify nationwide class action after relying on *Shutts*); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 347-48 (D.N.J. 1997) ("due process requires individual consideration of the choice of law issues" in a nationwide class action); *Ex parte Citicorp Acceptance Co*, 715 So.2d 199, 204 (Ala. 1997) (decertifying nationwide class action after citing *Shutts*). *See also Castano*, 84 F.3d at 741, 750 ("A requirement that a court know which law will apply before making a predominance determination is especially important when there maybe differences in state law."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (In order to establish commonality of the applicable law, nationwide class action movants must credibly demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'") (Ginsberg, J.) (quoting *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)); *Andrews v. American Tel. and Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class because of issues "compounded by the necessity of referencing fifty sets of . . . consumer protection law"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (reversing certification of nationwide class because "[i]f more than a few of the laws of the fifty states differ, the district court would face an impossible task of instructing a jury on the relevant law"); *Washington Mutual Bank, F.A. v. Superior Court*, 24 Cal.4th 906, 926, 15 P.3d 1071, 1085, 103 Cal.Rptr.2d 320, 335 (2001); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004).

view.[9] Indeed, the Arkansas Supreme Court in this case recognized that its decision conflicted with a long line of cases. App. at 12a-13a. Nevertheless, the Arkansas court held "we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis by our circuit courts." *Id.* at 13a. This Court should take this opportunity to resolve this conflict.

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[9] In addition to the Arkansas Supreme Court, the following courts have declined to decide choice of law incident to a motion for class certification. *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 78 (E.D.N.Y. 2004) (discussing *Shutts* and deciding that choice of law need not be addressed prior to certification); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691 (S.D. Fla. 1998) ("It is well-established that consideration of choice of law issues at the certification stage is generally premature."); *Kline v. First W. Gov't Secs.*, 1996 U.S. Dist. LEXIS 4019 (E.D. Pa. Mar. 14, 1996); *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (declining to decide choice of law question at class certification); *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 103 (M.D.N.C. 1993); *In re United Telecommunications, Inc. Sec. Litig.*, 1992 U.S. Dist Lexis 16580 (D. Kan. 1992) (same); *Walsh v. Chittenden Corp.*, 798 F.Supp. 1043, 1055 (D. Vt. 1992) (same); *Raytech Corp. v. White* 1991 U.S. Dist Lexis 19755 (D. Conn. Aug. 28, 1991) (any choice of law analysis at certification would be premature); *In re. Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991) (it is inappropriate to decide choice of law incident to a motion for class certification); *In re: Lilco Sec. Litig.*, 111 F.R.D. 663, 670-71 (E.D.N.Y. 1986) (at certification it is not necessary to decide choice of law); *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626, 630 (N.D. 1998); *Lobo Exploration Co. v. Amoco Production Co.*, 991 P.2d 1048, 1051 (Okla. App. 1999) (*Shutts* does not require resolution of choice of law before certification).

C. The Choice of Law Analysis is Critical Here Because the State Laws Differ Significantly with Regard to the Standards and Burdens of Proof for "Defect" and "Concealment"

The Arkansas Supreme Court attempted to slice the causes of action alleged (*i.e.*, express warranty, implied warranty, the Magnuson-Moss Warranty Act, unjust enrichment, and fraudulent concealment) to their simplest elements to find a common issue that presumably could be tried without a choice of law analysis. The Court assumed that "defect," an element of the warranty claims, and "concealment," an element of the fraud claim, could be tried by application of some unidentified, uniform standard. Pretermitting the impossibility of trying a single element of a claim without context to the nuances of the causes of action, there are no universally accepted standards or burdens of proof for "defect" or "concealment" – meaning there is no uniformity with regard to the facts or legal issues across the class. These differences, which GM outlined for the Arkansas courts as well, highlight that a choice of law analysis at the certification stage is necessary to avoid arbitrary results.[10]

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[10] Under Arkansas choice of law principles, the laws of all 51 jurisdictions would apply inasmuch as the key choice of law consideration in Arkansas is a state's interest in protecting its own citizens from the sale of defective products within that state. *E.g.*, *Ganey v. Kawasaki Motors Corp.*, 366 Ark. 238, 250-52, 234 S.W.3d 838 (Ark. 2006). That is same choice of law approach in most other states. *E.g.*, *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *Chin*, 182 F.R.D. at 456-57.

1. Defect

Courts have overwhelmingly determined that nationwide warranty claims cannot be certified because of the variations among state warranty laws.[11] Even if one were to focus on just the states that have adopted the Uniform Commercial Code for warranty claims, and its governing "defect" standard of whether a product is "merchantable," the variations are broad and deep.[12]

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[11] *See, e.g., Cole v. General Motors Corp.*, 484 F.3d 717, 725-30 (5th Cir. 2007); *Bridgestone*, 288 F.3d at 1018; *In re General Motors Corp. Dex-Cool Prod. Liab. Litig.*, 2007 U.S. Dist. LEXIS 11432, *68 (S.D. Ill. Feb. 16, 2007); *Cox House Moving, Inc. v. Ford Motor Co.*, 2006 U.S. Dist. LEXIS 81132, *17-18 (D.S.C. Nov. 6, 2006); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 194 F.R.D. 484, 489-90 (D.N.J. 2000); *Chin*, 182 F.R.D. at 456-62; *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. at 369; *Ford Ignition Switch*, 174 F.R.D. at 348-51; *Barbarin v. General Motors Corp.*, 1993 U.S. Dist. LEXIS 20980, *10 (D.D.C. Sept. 22, 1993); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-77 (D.D.C. 1990); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595, 604 (S.D.N.Y. 1982); *Gordon v. Ford Motor Co.*, 687 N.Y.S.2d 369, 370 (N.Y. App. 1999). Among the variations noted by these cases are whether notice of breach is required, whether reliance is an element of the claim, whether a failure to repair under warranty is simply a breach of a residual promise of repair, the different standards for merchantability, the different standards for used car sales, the standards for merchantability in leases, the presumptions of merchantability, the enforceability of warranty limitations, whether a plaintiff can recover for an unmanifested product defect, and whether privity is an impediment to a warranty claim.

[12] As an example of a state that does not follow the U.C.C. merchantability standard, Louisiana has two different (Cont'd)

In Arkansas the "defect" standard is whether the goods are "fit for [their] ordinary purpose."[13] In Delaware, courts focus on the "ordinarily prudent [manufacturer]."[14] By contrast, Massachusetts focuses on the "expectations" of the "reasonable consumer."[15] New York follows yet another approach, focusing at least in part on the expectations of the particular plaintiff.[16] Yet, other courts have looked to whether plaintiffs would suffer similar problems with other products on the

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standards for breach of warranty. The first applies when a "defect" makes a product "useless," and the other applies when a "defect . . . diminishes [the product's] usefulness." La. Civ. C. art. 2520.

[13] *Purina Mills v. Askins*, 317 Ark. 58, 65, 875 S.W.2d 843 (Ark. 1994).

[14] *Nacci v. Volkswagen of America, Inc.*, 325 A.2d 617, 620 (Del. Super. Ct. 1974) (in a design defect case, the merchantability standard is "whether the design has created a risk of harm which is so probable that an ordinarily prudent person, *acting as a manufacturer*, would pursue a different available design which would substantially lessen the probability of harm") (emphasis added).

[15] *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) ("[u]nder Massachusetts law the question of fitness for ordinary purposes is largely one centering around reasonable *consumer* expectations") (emphasis added).

[16] *See Denny v. Ford Motor Co.*, 639 N.Y.S.2d 250, 258-63 (1995) (implied warranty "inquiry focuses on [consumer] expectations" and the 'ordinary purpose' for which the product was marketed and sold to "the plaintiff").

market.[17] Numerous other courts look to the ordinary purpose of a product.[18] Still other standards have been employed.[19] Further confusing the issue is that some

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[17] *See Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 66 (Tex. App. Houston 1st Dist. 1998) ("Baker produced no evidence that Harris's failure to provide a warning caused its product to fall below the quality generally acceptable in that trade."), *overruled in part on other grounds, Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2008); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 107 (3d Cir. Pa. 1991) (finding that "Wyse introduced undisputed testimony that a user would encounter the same compatibility problems when using the [multi-user system] . . . offered by Wyse's primary competitors" and that since "[Wyse established that the multi-user system] conformed to industry standard . . . the evidence of incompatibility . . . is not sufficient to support a finding that Wyse breached the implied warranty of merchantability."); *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 661-62 (6th Cir. 1987) (finding that "Lancaster did not breach implied warranty of merchantability even though bulbs were not perfectly suited for new technology because bulbs conformed to contract and Lancaster tendered the kind of bulbs typically tendered.").

[18] *See Vision Graphics, Inc. v. E.I. Du Pont de Nemours & Co.*, 41 F. Supp. 2d 93, 99 (D. Mass. 1999) (court found that plaintiffs' claim that computer software was not merchantable was based on "a condition that is neither set forth in the written contract nor properly considered as an 'ordinary purpose' for which such system was intended."); *Right Weigh Scale Co. v. Eaton Corp.*, 998 F.2d 287, 289 (5th Cir. 1993) ("No evidence in the record establishes that these units were defective when used for the ordinary purposes for which [they were intended].").

[19] *See Horne v. Claude Ray Ford Sales, Inc.*, 290 S.E.2d 497, 499 (1982) (damage to a new car that does not affect a vehicle's

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courts occasionally treat warranty actions as tort (similar to a strict liability standard).[20] Whereas, some states treat the claim as fundamentally contractual.[21]

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"usefulness . . . or driveability" will not affect merchantability); *Welch v. Fitzgerald-Hicks Dodge*, 430 A.2d 144, 148 (N.H. 1981) (unmerchantable vehicle is "not of average quality or fit for the ordinary purpose for which an automobile is used"); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (holding that "[i]n the context of an implied warranty of merchantability case the word 'defect' means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy").

[20] *See, e.g., Higgins v. General Motors Corp.*, 287 Ark. 390, 391, 699 S.W.2d 741 (Ark. 1985) ("[a]s these two elements of a strict liability case are essentially the same required in a breach of warranty case, we will discuss the evidence in terms of strict liability"); *Camacho v. Honda Motor Co.*, 701 P.2d 628, 632 (Colo. Ct. App. 1985) ("[i]n any products liability case, regardless of whether recovery is sought under a theory of strict liability, negligence, or breach of an implied warranty, in order to impose liability on the manufacturer of a product, the complaining party must establish that the product causing the injury or damage was unreasonably dangerous because of a defect"), *rev'd on other grounds*, 741 P.2d 1240, 1242 n.3 (Colo. 1987); *First Nat'l Bank v. Regent Sports Corp.*, 803 F.2d 1431, 1438 (7th Cir. 1986) ("[I]n Illinois . . . the issue in a products liability suit brought on breach of warranty is essentially the same as one brought under strict tort liability theory").

[21] *See, e.g., Parrillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981) (implied warranty and strict liability are distinct, "one in contract and the other in tort, with each having its separate

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States also vary as to the specificity with which a defect must be proven in a warranty case.[22] In many

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analytical elements"). Predictably, such differences in approach lead to concrete differences in state rules. For example, courts holding breach of warranty to be tortious in nature often allow defendants to raise tort affirmative defenses of contributory negligence, assumption of risk, and product misuse. *See, e.g., Stephan v. Sears, Roebuck & Co.*, 266 A.2d 855, 858 (N.H. 1970). Courts adopting a contract characterization sometimes refuse to allow these defenses. *See, e.g., Holt v. Stihl, Inc.*, 449 F. Supp. 693, 694-95 (E.D. Tenn. 1977).

[22] *See, e.g., Ford Motor Co. v. General Accident Ins. Co.*, 365 Md. 321, 333 (2001) (In action arising when tow truck caught fire, "[t]he Court of Special Appeals erred in holding that proof of a specific product defect is not required to maintain a claim for breach of the implied warranty of merchantability."); *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 191 S.E.2d 110, 113 (Ga. App. 1972) ("the mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective"); *Bailey v. Le Beau*, 339 S.E.2d 460, 461-63 (N.C. App. 1986) (evidence that used car engine blew up, rendering car "inoperable" 15 days after purchase is insufficient evidence defect existed at time of sale to submit case to jury), *modified on other grounds*, 348 S.E.2d 524 (1986); *Scittarelli v. Providence Gas Co.*, 415 A.2d 1040, 1046 (R.I. 1980) ("proof that the oven door opened [improperly] does not tend to establish that the stove was defective"); *Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492, 496 (R.I. 1977) (in a scrupulously maintained automobile with under 4,000 miles on it "[t]he mere fact of a tire blowout does not tend to establish that the tire was defective"); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (defectiveness must be shown in an implied warranty of merchantability action, however, it may be shown by circumstantial evidence); *Feinstein v. Firestone*
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jurisdictions, claimants would be required to prove a defect with specificity. By contrast, other states have apparently rejected the need for a specific showing of a defect to recover in warranty.[23] These differing

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Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (court rejected class certification on basis that majority of class members could not show existence of defect with respect to their individual tires. "Plaintiffs' bald assertion that a 'common' defect which never manifests itself 'ipso facto caused economic loss' and breach of implied warranty is simply not the law."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 124 (N.Y. App. Div. 1st Dep't 2002) (same); *Hayles v. GMC*, 82 F. Supp. 2d 650, 659 (S.D. Tex. 1999) ("A plaintiff in an implied warranty of merchantability case must prove that the good complained of was defective at the time it left the manufacturer's or seller's possession.").

[23] *See Dickerson v. Mountain View Equip. Co.*, 710 P.2d 621, 626 (Idaho Ct. App. 1985) ("[a]lthough the existence of a defect normally supports the finding of a breach of an implied warranty of merchantability . . . such a requirement may unduly restrict the examination of a product's merchantability"); *Meldco, Inc. v. Hollytex Carpet Mills*, 796 P.2d 142, 146 (Idaho Ct. App. 1990) (court held that circumstantial evidence was sufficient to show unmerchantability and no proof of a manufacturing defect was required); *Todd Farm Corp. v. Navistar International Corp.*, 835 F.2d 1253, 1255 (8th Cir. 1987) (Iowa law) (plaintiff "need not prove any one specific defect"); *Roe Roofing, Inc. v. Lumber Products, Inc.*, 688 P.2d 425, 428 (Ore. App. 1984) (defect "could be proved circumstantially by evidence that plaintiff used the product in a normal fashion"); *Colorado Serum Co. v. Arp*, 504 P.2d 801, 805-06 (Wyo. 1972) ("there would seem to be no requirement that the allegedly defective product must be presented in evidence and be shown by analysis to be ipso facto

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approaches to the defect requirement are reflected in the states' model jury instructions. For example, in Hawaii, the jury must be instructed that: "If a product is 'defective' for purposes of strict products liability, *it is automatically not fit for its ordinary purpose.*"[24] In contrast, other jurisdictions, like Illinois, would not so instruct the jury because, under their law, breach of warranty and strict products liability are fundamentally different causes of action.[25]

These distinct formulations from different states are just on the threshold concept of "defect." Neither the Due Process Clause nor the Full Faith and Credit Clause permit Arkansas to apply some unidentified, presumptively universal standard to the determination of "defect" in abrogation of the justifiable expectations of the parties that their claims will be governed by law with a "significant contact or significant aggregation of

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defective . . . [s]uch proof is permissible by circumstantial evidence"); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357, 360 (Mo. Ct. App. 1989) ("The showing of specific defects in goods is obviously one way in which a buyer can establish that a seller has sold goods that are not merchantable and thus, breached this implied warranty. This, however, is not the only way in which a buyer may show a breach of this implied warranty.") (quoting *Worthey v. Specialty Foam Products, Inc.*, 591 S.W.2d 145, 149 (Mo. Ct. App. 1979)).

[24] Hawaii Civil Jury Instructions No. 13.2 (1999) (emphasis added).

[25] 1-34 Illinois Forms of Jury Instruction § 34.153, cmt. (emphasis added).

contacts to the claims asserted by each member of the class." *Shutts*, 472 U.S at 821.

2. Concealment

The law of fraud is materially different in the 51 jurisdictions at issue, and thus courts have overwhelmingly denied nationwide certification of such claims.[26] Even something as basic as the burden of proof for fraud differs dramatically. Many states allow for recovery if fraud is proven by a "preponderance of the evidence."[27] Many other jurisdictions, however, require

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[26] *See, e.g., Bridgestone*, 288 F.3d at 1018; *Castano*, 84 F.3d at 743 n. 15; *Lewis Tree Service, Inc. v. Lucent Technologies*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222-23 (E.D. La. 1998). These differences include the standards for concealment, burdens of proof, materiality, reliance, the requisite knowledge of the defendant that triggers fraud, and the duty to disclose.

[27] *Compagnie de Reassurance D'ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 72 (1st Cir. 1995) (applying Massachusetts law); *Denuptiis v. Unocal Corp.*, 63 P.3d 272, 277 (Alaska 2003); *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 580 (Ark. 2002); *Caldwell v. Armstrong*, 642 P.2d 47, 50 (Colo. Ct. App. 1981); *In re IBP S'holders Litig. v. Tyson Foods, Inc.*, 789 A.2d 14, 54 (Del. Ch. 2001); *Wieczoreck v. H & H Builders, Inc.*, 475 So. 2d 227, 228 (Fla. 1985); *Massey v. Stembridge*, 341 S.E.2d 247, 249 (Ga. App. 1986); *Terre Haute Regional Hospital, Inc. v. Basden*, 524 N.E.2d 1306, 1311 (Ind. Ct. App. 1988); *Opti-Flow, LLC v. Prod. Servs. Int'l*, Ltd., 903 So. 2d 1171, 1175 (La. App. 3 Cir. June 1, 2005); *Artilla Cove Resort v. Hartley*, 72 S.W.3d 291, 295-96 (Mo. Ct. App. 2002); *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993); *Barrett v. Holland & Hart*, 845 P.2d 714, 717 (Mont. 1992); *Bulbman, Inc.*
(Cont'd)

proof by the heightened standard of "clear and convincing evidence."[28] Two states (South Carolina and Washington) apply a "clear, cogent and convincing" standard.[29] And still other states apply some hybrid or

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v. Nevada Bell, 825 P.2d 588, 592 (1992); *Poe v. Lennon*, 89 S.E. 1003, 1005 (N.C. 1916); *Ostalkiewicz v. Guardian Alarm, Div. of Colbert's Sec. Servs.*, 520 A.2d 563, 569 (R.I. 1987); *Speck v. Anderson*, 349 N.W.2d 49, 50 (S.D. 1984); *Capital Management Partners v. Eggleston*, 2005 WL 1606066, at *7-9 (Tenn. Ct. App., Jul 7, 2005); *Browder v. Eicher*, 841 S.W.2d 500, 502-03 (Tex. App. Houston 14th Dist. 1992).

[28] *See Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 76-77 (D.P.R. 2004); *Jones v. Estelle*, 348 So. 2d 479, 481 (Ala. 1977); *Black v. Goodwin, Loomis & Britton, Inc.*, 681 A.2d 293, 303 (1996); *Va. Acad. of Clinical Psychologists v. Group Hospitalization & Med. Servs.*, 878 A.2d 1226, 1233 (D.C. 2005); *Shoppe v. Gucci Am., Inc.*, 94 Haw. 368, 14 P.3d 1049, 1067 (Haw. 2000); *Lindberg v. Roseth*, 137 Idaho 222, 46 P.3d 518, 521-22 (Idaho 2002); *Rand v. Bath Iron Works Corp.*, 832 A.2d 771, 773 (Me. 2003); *Gorman v. Soble*, 328 N.W.2d 119, 124 (1982); *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762 (Miss. 2004); *Snow v. American Morgan Horse Ass'n*, 686 A.2d 1168, 1170 (N.H. 1996); *Golden Cone Concepts v. Villa Linda Mall*, 820 P.2d 1323, 1328 (N.M. 1991); *Heart River Partners v. Goetzfried*, 703 N.W.2d 330, 339 (N.D. 2005); *Rogers v. Meiser*, 2003 OK 6, 68 P.3d 967, 977 (Okla. 2003); *Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1179 (2001); *Hardwick-Morrison Co. v. Albertsson*, 605 A.2d 529, 531 (Vt. 1992); *State Farm Mut. Auto. Ins. Co. v. Remley*, 618 S.E.2d 316, 321 (Va. 2005); *Lundin v. Shimanski*, 368 N.W.2d 676, 680-81 (Wis. 1985); *Bitker v. First Nat'l Bank*, 2004 WY 114, 98 P.3d 853, 856 (Wyo. 2004).

[29] *See Cowburn v. Leventis*, 619 S.E.2d 437, 446 (S.C. App. 2005) ("'Each and every element [of fraud] must be proven by (Cont'd)

variant formulation.[30] As the Third Circuit cautioned, charging the jury with the wrong burden of proof in a fraud action is fundamental error. *See Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 27 (3d Cir. 1981) ("[A] new trial is necessary because of fundamental error committed in the charge on the burden of proving fraud.").

There is no basis in fact or law for the Arkansas Supreme Court's hypothesis that "concealment" is an issue that can be determined by an unarticulated, universally accepted standard. This arbitrary approach does not comport with Due Process and Full Faith and Credit principles.

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clear, cogent, and convincing evidence.'") (citation omitted); *Stiley v. Block*, 925 P.2d 194, 204 (1996) (en banc) ("Each element of fraud must be established by 'clear, cogent and convincing evidence.'") (citation omitted).

[30] *See Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 64 (Iowa 2004) ("Our law is clear that all the elements of common-law fraud must be established by a preponderance of evidence that is clear, satisfactory, and convincing. . . . '[C]lear and satisfactory' refers to the *character or nature of the evidence*, whereas 'preponderance' of the evidence is a *quantitative measure*.") (emphasis added) (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS DATED JUNE 19, 2008

SUPREME COURT OF ARKANSAS

No. 07-437

GENERAL MOTORS CORPORATION, D/B/A CHEVROLET, GMC, CADILLAC, BUICK, AND OLDSMOBILE,

Appellant,

VS.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Appellee.

Opinion Delivered June 19, 2008

APPEAL FROM THE MILLER COUNTY CIRCUIT COURT,

NO. CV-2005-051-2,

HON. JAMES SCOTT HUDSON, JR., JUDGE.

AFFIRMED.

Appendix A

PAUL E. DANIELSON, Associate Justice

Appellant General Motors Corporation d/b/a Chevrolet, GMC, Cadillac, Buick, and Oldsmobile appeals interlocutorily from the circuit court's order granting class certification to appellee Boyd Bryant, on behalf of himself and all other similarly situated persons. General Motors asserts four points on appeal: (1) that extensive legal variations in state laws defeat predominance; (2) that extensive factual variations in the millions of claims defeat predominance; (3) that class certification is not superior under Arkansas Rule of Civil Procedure 23(b); and (4) that the class definition is imprecise and overbroad. We affirm the circuit court's order granting class certification.

On September 5, 2006, Bryant filed a first amended class-action complaint in which he alleged that some 4,000,000 pickup trucks and sport utility vehicles sold by General Motors were equipped with defectively designed parking brakes. Specifically, Bryant alleged that the vehicles, model years 1999 through 2002:

> contain parking brakes whose linings, due to a defectively designed high force spring clip, do not adequately float inside the parking brake drums. This failure, alone, is problematic and harms Plaintiff and Class members. But inadequate lining float, by GM's own admission, also causes the parking brakes to "self-energize" and experience excessive lining wear after only 2,500 to 6,000 miles in use.

Bryant alleged that General Motors discovered the defect in late 2000, redesigned the defective spring clip in October 2001, and withheld from dealers admission of responsibility for the defect until January 28, 2003. Bryant alleged that General Motors's actions permitted it to avoid paying millions of dollars in warranty claims. He further stated that, while General Motors recalled manual-transmission trucks with the defective parking brakes in 2005, the recall only involved about 60,000 vehicles and did not include the nearly 4,000,000 automatic-transmission vehicles owned by himself and the members of the class. For his causes of action, Bryant alleged the following: breach of express warranty, breach of implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, unjust enrichment, and fraudulent concealment/failure to disclose. Finally, Bryant sought damages "in an amount necessary to remedy the defective parking brakes[,]" or, alternatively, out-of-pocket money damages for those who had previously paid for repairs, or, alternatively, disgorgement and restitution. After a hearing on a motion for class certification filed by Bryant, the circuit court issued a fifty-one page order in which it concluded that Bryant had satisfied each of the requirements for class certification set forth in Ark. R. Civ. P. 23 and defined the class as follows:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in-Hat parking brake system utilizing a high-force

> spring clip retainer [footnote omitted], that registered his vehicle in any state in the United States.

General Motors now appeals, challenging the circuit court's findings as to predominance, superiority, and the class definition itself.

I. Standard of Review

Rule 23 of the Arkansas Rules of Civil Procedure governs class actions and provides, in pertinent part:

> *(a) Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class.
>
> *(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any

> questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. At an early practicable time after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. For purposes of this subdivision, "practicable" means reasonably capable of being accomplished. An order under this section may be altered or amended at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.

Ark. R. Civ. P. 23(a-b) (2007). Our law is well-settled that the six requirements for class-action certification include: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy, (5) predominance, and (6) superiority. *See THE/FRE, Inc. v. Martin*, 349 Ark. 507, 78 S.W.3d 723 (2002). In reviewing an order granting class certification, we use the following standard for review:

> We begin by noting that it is well settled that this court will not reverse a circuit court's ruling on a class certification absent an abuse of discretion. *See, e.g., Arkansas Blue Cross & Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002). In reviewing a lower court's class certification order, "this court focuses on the evidence in the record to determine whether

> it supports the trial court's conclusion regarding certification." *Arkansas Blue Cross & Blue Shield*, 349 Ark. at 279, 78 S.W.3d at 64. We have held that "neither the trial court nor the appellate court may delve into the merits of the underlying claim in determining whether the elements of Rule 23 have been satisfied." *Id.* Our court has said on this point that " *a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.*" *Id.* We, thus, view the propriety of a class action as a procedural question. *See id.*

Carquest of Hot Springs, Inc. v. General Parts, Inc., 367 Ark. 218, 223, 238 S.W.3d 916, 919-20 (2006) (quoting *Van Buren Sch. Dist. v. Jones*, 365 Ark. 610, 613, 232 S.W.3d 444, 447-48 (2006) (emphasis added)).

II. Predominance

A. Choice of Law

General Motors initially argues that the significant variations among the fifty-one motor-vehicles product-defect laws defeat predominance and prevent certification in the instant case. It contends that a choice-of-law analysis must be conducted prior to certification of the class and that the circuit court's failure to conduct such an analysis at this juncture permits due-process considerations to evade this court's review. Bryant responds that the circuit court correctly adhered to this

court's precedent, which he claims does not require a rigorous choice-of-law analysis prior to class certification. He further contends that the circuit court's predominance finding should be affirmed as this court has previously recognized a circuit court's broad discretion to certify and manage a class action, which includes the circuit court's ability to conduct a choice-of-law analysis subsequent to class certification. General Motors replies that the elements of each of Bryant's claims must be examined so that the basic requirements of Rule 23 can be objectively determined.

Here, the circuit court provided four reasons for its finding that the potential application of multiple states' law did not create predominance concerns. First, the circuit court noted, the cases relied upon by General Motors were federal cases that required a "rigorous analysis" of Fed.R.Civ.P. 23's class-certification factors "including the impact state-law variations had on predominance." Because this court required no such rigorous analysis, the circuit court rejected General Motors's attempt to engraft such an analysis requirement into Ark. R. Civ. P. 23 and preferred, instead, to follow this court's precedent "in determining whether class certification [was] appropriate." Second, the circuit court found that Arkansas circuit courts have wide discretion to manage class actions and, pursuant to *Security Benefit Life Insurance Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), the potential application of many states' laws was not germane to class certification. Instead, the circuit court opined, this court "viewed choice of law as a task for the trial court to

undertake later in the course of exercising its autonomy and 'substantial powers' to manage the class action."

For its third reason, the circuit court found that there was "no greater merits-intensive determination than the one regarding choice of law." With that in mind, the circuit court stated, "[I]t would be premature for the Court, at this stage in the case, to make the call on choice of law." Finally, the circuit court observed, a decision to certify the matter as a class without resolution of the choice-of-law issue would not create incurable problems in that, if application of multiple states' laws was eventually required, and it proved too cumbersome or problematic, the circuit court could always consider decertifying the class.

We cannot say that the circuit court abused its discretion in rejecting General Motors's argument on this issue as to predominance. We have held that the starting point in examining the issue of predominance is whether a common wrong has been alleged against the defendant. *See Chartone, Inc. v. Raglon*, __ Ark. __, __ S.W.3d __ (Apr. 24, 2008). If a case involves preliminary, common issues of liability and wrongdoing that affect all class members, the predominance requirement of Rule 23 is satisfied even if the circuit court must subsequently determine individual damage issues in bifurcated proceedings. *See id.* We have recognized that a bifurcated process of certifying a class to resolve preliminary, common issues and then

decertifying the class to resolve individual issues, such as damages, is consistent with Rule 23. *See id.* In addition, we have said that:

> [t]he predominance element can be satisfied if the preliminary, common issues may be resolved before any individual issues. In making this determination, we do not merely compare the number of individual versus common claims. Instead, we must decide if the issues common to all plaintiffs "predominate over" the individual issues, which can be resolved during the decertified stage of bifurcated proceedings.

Id. at __, __ S.W.3d at __ (quoting *Georgia-Pacific Corp. v. Carter*, 371 Ark. 295, 301, __ S.W.3d __, __ (2007)). Our inquiry is whether there is a predominating question that can be answered before determining any individual issues.

We hold that there is. Whether or not the class vehicles contain a defectively designed parking-brake system and whether or not General Motors concealed that defect are predominating questions. That various states' laws may be required in determining the allegations of breach of express warranty, breach of implied warranty, a violation of the Magnuson-Moss Warranty Act, unjust enrichment, fraudulent concealment, damages, and restitution does not defeat predominance in the instant case.

We recently noted in *FirstPlus Home Loan Owner 1997-1 v. Bryant*, 372 Ark. 466, __ S. W.3d __ (2008), that the mere fact that choice of law may be involved in the case of some parties living in different states is not sufficient in and of itself to warrant a denial of class certification, citing our prior decision of *Security Benefit Life Insurance Co. v. Graham, supra.* In *Security Benefit*, we observed that Security Benefit's main argument "appear[ed] to center on the fact that the law of thirty-nine states relative to novation would have to be explored and that this would splinter the class action into individual lawsuits." 306 Ark. at 44, 810 S.W.2d at 945. We rejected its argument, holding that "resolution of the common questions of law or fact would enhance efficiency for all parties, even if individual claims still remained to be adjudicated." *Id.*, 810 S.W.2d at 945. We then observed:

> The mere fact that choice of law may be involved in the case of some claimants living in different states is not sufficient in and of itself to warrant a denial of class certification. *Cf., Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). *And though we are not convinced at this stage that reference to the laws of thirty-nine states will be necessary, should it be required, this does not seem a particularly daunting or unmanageable task for the parties or for the trial court.*

Because Arkansas is the home state for First Pyramid and because Arkansas law is

> the law to be applied under the Master Policy, it is the logical situs for this action. Actions in thirty-nine states, even with considerable joinder, would be inefficient, duplicative, and a drain on judicial resources. *Denial of class action status could well reduce the number of claims brought in this matter, but that result is hardly in the interest of substantial justice.*

Id. at 44-45, 810 S.W.2d at 945-46 (emphasis added).

Thus, we have suggested that multistate class actions are not per se problematic for Arkansas courts. A question of first impression still remains, however, as to whether an Arkansas circuit court must first conduct a choice-of-law analysis before certifying a multistate class action. In examining that question, we must keep in mind that we have been resolute that the circuit court is afforded broad discretion in matters regarding class certification. *See Chartone, Inc. v. Raglon*, *supra*; *Johnson's Sales Co., Inc. v. Harris*, 370 Ark. 387, __ S.W.3d __ (2007). In addition, we have held that "[t]he mere fact individual issues and defenses may be raised by the [defendant] regarding the recovery of individual members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing which must be resolved for all class members." *FirstPlus Home Loan Owner 1997-1*, 372 Ark. at __, __ S.W.3d __.

As already stated, there are clearly common questions concerning General Motors's alleged wrongdoing that will have to be resolved for all class members, and we view any potential choice-of-law determination and application as being similar to a determination of individual issues, which cannot defeat certification. *See, e.g., THE/FRE, Inc. v. Martin, supra.* Other courts may disagree. *See, e.g., In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark.2005) (observing that when class certification is sought in a case based on common-law claims, the question of which law governs is crucial in making a class-certification decision); *Washington Mut. Bank, FA v. Superior Court*, 24 Cal.4th 906, 926, 15 P.3d 1071, 1085, 103 Cal.Rptr.2d 320, 335 (2001) (noting its favor in adopting the type of burdens articulated in federal decisions and holding that "a class action proponent must credibly demonstrate, through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance"); *Beegal v. Park West Gallery*, 394 N.J.Super. 98, 925 A.2d 684 (2007) (holding that a class-action motion court has a duty to conduct a choice-of-law analysis before deciding whether the predominance element is satisfied and that, although conflict-of-law issues do not per se foreclose certification of a multistate class, a thorough analysis of state laws is particularly important where a possibility exists that common issues could be subsumed by substantive conflicts in state laws; *but*, advising that a trial court should undertake a rigorous analysis to determine if the requirements of the class-certification rule have been met); *Compaq Computer Corp. v. Lapray*,

135 S.W.3d 657, 672 (Tex.2004) (holding that "when ruling on motions for class certifications, trial courts must conduct an extensive choice of law analysis before they can determine predominance, superiority, cohesiveness, and even manageability"; *but*, also requiring that its courts perform a rigorous analysis before ruling on class certification to determine whether all prerequisites to certification have been met). However, those decisions do not bind this court, nor do they dictate that were we to permit a choice-of-law analysis after class certification, such a decision would be erroneous.

Moreover, we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts. *See, e.g., Beverly Enters.-Arkansas, Inc. v. Thomas*, 370 Ark. 310, __ S.W.3d __ (2007). *See also Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997). Instead, we have given the circuit courts of our state broad discretion in determining whether the requirements for class certification have been met, recognizing the caveat that a class can always be decertified at a later date if necessary. *See, e.g., Beverly Enters.-Arkansas v. Thomas, supra; Farmers Ins. Co., Inc. v. Snowden*, 366 Ark. 138, 233 S.W.3d 664 (2006); *Tay-Tay, Inc. v. Young*, 349 Ark. 675, 80 S.W.3d 365 (2002). As our rule so clearly provides, "[a]n order under this section may be altered or amended at any time before the court enters final judgment." Ark. R. Civ. P. 23(b).

Indeed, it is possible that other states' laws might be applicable to the class members' claims. However, we cannot say that our class-action jurisprudence requires an Arkansas circuit court to engage in a choice-of-law analysis prior to certifying a class, as we have not hesitated to affirm a finding of predominance so long as a common issue to all class members predominated over individual issues. While General Motors argues that a failure to require such an analysis precertification allows that analysis to evade review, it is mistaken. Upon a final order by the circuit court, General Motors would be able to challenge the circuit court's choice of law, just as in any other case. *See, e.g., Ganey v. Kawasaki Motors Corp., U.S.A.*, 366 Ark. 238, 234 S.W.3d 838 (2006) (reviewing a circuit court's decision to apply Louisiana law in an appeal from an order of dismissal in a products-liability case). Moreover, were we to require the circuit court to conclude at this time precisely which law should be applied, such a decision could potentially stray into the merits of the action itself, which we have clearly stated shall not occur during the certification process. *See, e.g., Carquest of Hot Springs, Inc. v. General Parts, Inc., supra.* For these reasons, we cannot say that the circuit court abused its discretion in finding that the predominance requirement was not precluded by the potential application of other states' laws.

b. Factual Variations

General Motors next asserts that many factual variations preclude a finding of predominance. It claims that the following questions are individualized and

predominate over any common question: (1) does a class member's parking brake have a defect; (2) if a parking brake failed, how will causation be determined; (3) with regard to the alleged "cover up," what did General Motors know and when, and what did General Motors disclose and when; (4) was a parking brake repaired already under warranty and, if not, why not; (5) when did a class member's warranty expire; (6) did a class member first provide General Motors with notice of breach; (7) did a class member have knowledge about a potential parking-brake problem at the time of purchase; (8) did a class member rely on General Motors's alleged misrepresentation; (9) were the alleged misrepresentations or omissions material to a class member; (10) for leased vehicles, is General Motors liable to the lessor or the lessee; (11) is a class member's claim barred by the statute of limitations; (12) is a class member's claim barred by various affirmative defenses, such as comparative negligence; and (13) what the appropriate remedy, if any, is for any particular class member. Bryant responds that the central common issues in the case can be decided first and that any potential individualized issue raised by General Motors can be dealt with after deciding the common predominating issues. General Motors replies, in essence, that where there are numerous individualized issues, they can be better resolved on a case-by-case basis.

We cannot say that the circuit court abused its discretion in its finding that factual variations did not

preclude a finding of predominance. Here, the circuit court found that:

> the alleged inadequate float problem appears to be something that is present in all class vehicles and which occurs each time a class vehicle is used. This is because all class vehicles utilize the PBR 210x30 Drum-in-Hat park brake system, and GM has admitted in numerous documents, with little to no equivocation, that the inadequate float problem regarding that brake system is a real one.

It further found that:

> the presence of this common inadequate float problem negates GM's argument that there is no one set of operative facts that establishes liability, or no single proximate cause that equally applies to each potential class member. . . . 23. Even assuming *arguendo* the parking brake "failure" should, as GM says, be defined more broadly such that individual inspections for lining wear and/or consideration of individual use factors might be necessary, Rule 23(b) predominance still exists. The Court views any need for individual inspections and/or the individual use factors merely as individual determinations relating to right to recovery or damages that pale in comparison to the

> common issues surrounding GM's alleged defectively designed parking brake and cover up to avoid paying warranty claims. . . .

We have repeatedly recognized that conducting a trial on the common issue in a representative fashion can achieve judicial efficiency. *See Arkansas Blue Cross & Blue Shield v. Hicks*, *supra* . Furthermore, we have routinely found the bifurcated process of class actions to be consistent with Rule 23(d), which allows the circuit court to enter orders necessary for the appropriate management of the class action. *See id.* In fact, we have expressed our approval for the bifurcated approach to the predominance element by allowing circuit courts to divide a case into two phases: (1) certification for resolution of the preliminary, common issues; and (2) decertification for the resolution of the individual issues. *See id.* The bifurcated approach has only been disallowed where the preliminary issues to be resolved were individual issues rather than common ones, *see id.*, which is not the situation in the instant case.

As already stated, the common issue that predominates here over any other potential issue is whether the parking-brake system installed in the class members' vehicles was defective and whether General Motors attempted to conceal any alleged defect. These overarching issues can be resolved before the circuit court reaches any of the individualized questions raised by General Motors. *See, e.g., Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462 (2006). We have held that the mere fact that individual issues and

defenses may be raised by the defendant regarding the recovery of individual class members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members. *See FirstPlus Home Loan Owner 1997-1 v. Bryant, supra.* Moreover, we have observed that challenges based on the statutes of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability. *See id.* (quoting *SEECO, Inc. v. Hales*, 330 Ark. 402, 413, 954 S.W.2d 234, 240 (1997) (quoting 1 Herbert B. Newberg, *Newberg on Class Actions* § 4.26, at 4-104 (3d ed.1992))). Accordingly, we cannot say that the circuit court abused its discretion in its finding of predominance.

III. Superiority

For its third point on appeal, General Motors contends that the circuit court erred in its finding on superiority. It urges that the superior method of handling a claim that particular vehicles are defective is by petition to the National Highway Traffic Safety Administration (NHTSA). It submits that a class action would be unmanageable and unfair, arguing further that certification of the instant class would be unconstitutional, should bifurcation take place. Bryant responds that where the NHTSA has already denied relief to the proposed class members, NHTSA's process

can in no way be superior to a class action. He further asserts that a class action would be manageable and fair and that, because it is not yet known whether bifurcation would be required, this court should not address General Motors's constitutional claim.

Rule 23(b) requires "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This court has repeatedly held that the superiority requirement is satisfied if class certification is the more efficient way of handling the case, and it is fair to both sides. *See Chartone, Inc. v. Raglon, supra.* Where a cohesive and manageable class exists, we have held that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary. *See id.* This court has further stated that when a circuit court is determining whether class-action status is the superior method for adjudication of a matter, it may be necessary for the circuit court to evaluate the manageability of the class. *See id.* Furthermore, the avoidance of multiple suits lies at the heart of any class action. *See id.*

In the instant case, the circuit court concluded that a class was the superior method to resolve the claims of Bryant and the proposed class. With respect to manageability, the circuit court stated:

> 46. First, the Court does not believe for one moment that 4,000,000 individual, phase II

trials will be conducted in this case. Among other things, potential opt outs and claims dismissed under a summary disposition procedure that can be developed will greatly reduce the number of potential phase II trials.

47. Second, *Lenders II* [358 Ark. 66, 186 S.W.3d 695 (2004)] concerned a class of 50,000 potential members and the Arkansas Supreme Court took no issue with it proceeding as a class action. [Citation omitted.] In the Court's view, the prospect of trying 50,000 cases is no different, from a manageability standpoint, than trying a potentially greater number of cases.

48. Third, the fact GM's allegedly defective design has adversely affected so many consumers is not Mr. Bryant's fault. Mr. Bryant and the class should not be penalized for the widespread nature of GM's alleged defect and subsequent cover up. [Citation omitted.]

49. Finally, in at least the context of discussing class definition, the Arkansas Supreme Court has rejected lack of administrative feasibility as an excuse to avoid class certification. [Citation omitted.] The Court believes the Arkansas Supreme Court would similarly reject GM's similar argument that class size, alone, counsels against a finding of Rule 23(b) predominance.

Appendix A

With respect to the propriety of a class action versus the NHTSA, the circuit court found:

> Moreover, as brought to light at the class certification hearing, the record reveals frustrated consumers have at least twice (most recently in mid 2006) petitioned NHTSA about the alleged parking brake defect in automatic transmission vehicles, and NHTSA rejected the petitions. Accordingly, the Court does not understand why GM believes NHTSA will provide a superior remedy to Mr. Bryant and class members. The Court concludes GM's NHTSA-based superiority argument has no merit. Mr. Bryant has established Rule 23(b) superiority.

Here, the proposed class of approximately 4,000,000 members makes it at least likely that without a class action, numerous meritorious claims might go unaddressed. We have held that to be a factor in determining superiority. *See, e.g., Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004). In addition, the circuit court found that the uniform relief sought by Mr. Bryant and the class was relatively small if sought on an individual basis, and, thus, it was not economically feasible for members of the class to pursue General Motors on an individual basis. While not the sole basis for certifying the class, the smallness of the claims is another factor to be considered in deciding superiority. *See id.* It is evident that the circuit court thoroughly considered the manageability of the proposed class.

For that reason, we cannot say that the circuit court abused its discretion in finding that the class was manageable. And again, as to manageability, this court has made it abundantly clear that a circuit court can always decertify a class should the action become too unwieldy. *See Tay-Tay, Inc. v. Young, supra.*

Nor can we say that a class action is not superior to having the matter addressed by the NHTSA. As noted by the circuit court, NHTSA has twice rejected petitions dealing with the allegations made in the instant case. Clearly, resolution by that agency cannot be superior to a class action when the agency has made such a rejection. Moreover, it has been recognized that the Motor Vehicle Safety Act and NHTSA itself do not in any way preempt a plaintiff's right to bring common-law claims against the manufacturer of an allegedly defective part. *See, e.g., Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D.N.J.1998) (citing 49 U.S.C. § 30103); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332 (D.N.J.1997) (citing 49 U.S.C. § 30103). *See also Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir.1973) ("As we view it, it would appear that [Fed.R.Civ.P. 23(b)(3)]was not intended to weigh the superiority of a class action against possible administrative relief. The 'superiority requirement' was intended to refer to the preferability of adjudicating claims of multiple-parties in one judicial proceeding and in one forum, rather than forcing each plaintiff to proceed by separate suit, and possibly requiring a defendant to answer suits growing out of one incident

in geographically separated courts."). With this in mind, we hold that the circuit court did not abuse its discretion in finding that a class-action suit was superior to resolution by the NHTSA.

Nor does the possibility of bifurcation render the instant class certification unconstitutional. As we have previously held, we do not know at the point of certification whether more than one jury would ultimately be necessary, and we will not speculate on the question of the inevitability of bifurcated trials or issue an advisory opinion on an issue that well may not develop. *See, e.g., BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000).

IV. Class Definition

General Motors, for its final point, argues that the instant class definition is both overbroad and amorphous, arguing that the definition in no way distinguishes between "owners" and "subsequent owners" and that the class definition includes categories of individuals that have not been harmed in any fashion.[1]

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1. For example, General Motors suggests the following categories: "owners who have never had a problem, those who have already had a warranty repair, those who experienced a problem after the expiration of the warranty, those who chose never to seek the warranty repair, those who sold their vehicles before a problem occurred, those who acquired vehicles after a repair had already occurred, and those who experienced parking brake failures that were caused by something other than wear condition."

Bryant responds that the circuit court correctly determined that the class was subject to precise definition and was not overbroad.

With respect to class definition, it is axiomatic that for a class to be certified, a class must exist. *See Asbury Auto. Group, Inc. v. Palasack, supra.* The definition of the class to be certified must first meet a standard that is not explicit in the text of Rule 23, that the class be susceptible to precise definition. *See id.* This is to ensure that the class is neither "amorphous" nor "imprecise." *See id.* Concurrently, the class representatives must be members of that class. *See id.* Thus, before a class can be certified under Rule 23, the class description must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class. *See id.* Furthermore, for a class to be sufficiently defined, the identity of the class members must be ascertainable by reference to objective criteria. *See id.*

Here, the circuit court defined the class in a precise, objective manner. The class definition clearly states that the class includes any owner or subsequent owner of a 1999-2002 1500 Series pickup or utility vehicle that was originally equipped with an automatic transmission and the specified parking-brake system. Thus, the identity of the class members can be ascertained without an investigation into the merits of each individual's claim. *See, e.g., Lenders Title Co. v. Chandler, supra.* Moreover, the circuit court found that the terms "owners" and "subsequent owners" were terms taken from General

Motors's own warranty publications and that General Motors admitted it had the ability to provide personal information regarding the original vehicle purchasers via its warranty database, as well as current vehicle owners via vehicle-identification-number searches conducted by third-party vendors. In addition, the circuit court further pointed to the fact that General Motors had previously conducted a recall on its manual-transmission version of the class vehicles, which demonstrated the administrative feasibility of General Motors's ability to not only identify class members, but also its ability to contact them. We simply cannot say that the class definition is in any way overbroad.

Nor do any individual issues among potential class members raised by General Motors render the definition imprecise. As already made clear, such issues cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members. *See FirstPlus Home Loan Owner 1997-1 v. Bryant*, *supra*. We hold, therefore, that the class is identifiable from objective criteria, specifically, ownership of the specified vehicles so specifically equipped, and that the circuit court did not abuse its discretion in finding that the class definition was sufficiently precise.

For the foregoing reasons, we affirm the circuit court's order granting class certification.

Affirmed.

Special Justice LANE STROTHER joins.

CORBIN and IMBER, JJ., concur.

GUNTER, J., not participating.

Appendix A

SUPREME COURT OF ARKANSAS

No. 07-437

GENERAL MOTORS CORPORATION, D/B/A CHEVROLET, GMC, CADILLAC, BUICK, AND OLDSMOBILE,

APPELLANT,

VS.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

APPELLEE.

Opinion Delivered June 19, 2008

APPEAL FROM THE MILLER COUNTY CIRCUIT COURT,

NO. CV-2005-051-2,

HON. JAMES SCOTT HUDSON, JR., JUDGE,

CONCURRING.

Appendix A

ANNABELLE CLINTON IMBER, Associate Justice

While I concur in the result on the facts presented by this case, I write separately because I believe the majority's analysis of General Motors's argument on the choice-of-law issue reaches a conclusion that is overbroad. The majority declares that addressing any choice-of-law argument at the class-certification stage goes beyond our required analysis of the elements of certification and is, therefore, never indicated. Such a declaration extends far past the holdings of our prior case law addressing class certification and forecloses analysis that could conceivably be required.

Prior Case Law

The majority cites *FirstPlus Home Loan Owner 1997-1 v. Bryant*, 372 Ark. 466, __ S.W.3d __ (2008), and *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), and quotes them as holding the mere fact that choice-of-law may be involved in the case of some parties living in different states is not sufficient in and of itself to warrant a denial of class certification, and multi-state class actions are not per se problematic for our state's courts. From that holding, the majority then goes on to conclude that "*any* potential choice-of-law determination and application" is "similar to a determination of individual issues, which cannot defeat certification." (Emphasis added).

In *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), owners of certain single-

premium, deferred annuities filed a complaint against an insurer, alleging breach of contract. The circuit court granted a motion for certification of a class of plaintiffs defined as all present owners of individual insurance certificates issued by the insurer under one certain master policy. *Id.* at 41, 810 S.W.2d at 944. The insurer appealed class certification, alleging, inter alia, that common issues of law did not predominate over individual issues because the certificate holders resided in thirty-nine states. *Id.* at 43, 810 S.W.2d at 945. We rejected the argument that application of the law of thirty-nine states relative to a defense of novation defeated the predominance element of class certification, concluding that a class action would resolve several common questions more efficiently than joinder of plaintiffs, and it did not "seem a particularly daunting or unmanageable task for the parties or the trial court" to apply the laws of multiple states to determine whether the insurer could avail itself of a defense of novation against the class members who resided in the respective states. *Id.* Thus, similar to the instant case, the choice-of-law issue presented in *Security Benefit* was related to plaintiffs' individual recoveries and corresponding defenses the defendant could maintain against those plaintiffs. We did not, however, conclude in *Security Benefit* that the circuit court was prohibited from considering any choice-of-law issues at the class-certification stage.

The majority also cites *THE/ FRE, Inc. v. Martin*, 349 Ark. 507, 78 S.W.3d 723 (2002), for the proposition that "any potential choice-of-law determination and

application [is] similar to a determination of individual issues, which cannot defeat certification." In *THE/FRE*, we affirmed the circuit court's grant of class certification against the appellants' assertion that issues related to recovery of individual class members and defenses that may be raised by the appellants predominated over common questions of law or fact. To the extent that choice-of-law issues in the instant case go to potential recovery of individual class members or potential defenses that GM may raise, I agree with the majority's reasoning. The circuit court in *THE/FRE*, however, did not consider any choice-of-law issues. Thus, I fail to see any logic or authority that will span the gap between our conclusion in the *THE/FRE* case and the majority's conclusion in the instant case. A conclusion here that choice-of-law issues not related to recovery or defenses will never predominate over common questions of law or fact is one that I find to be impermissibly overbroad.

Rigorous Analysis

Next, the majority holds that a choice-of-law analysis is foreclosed at the class-certification stage because "we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts." As support for this proposition, the majority cites federal court decisions, all of which hold that the trial court must conduct a "thorough" or "rigorous" analysis of the choice of governing state law before certifying a case as a class action. While it may be a necessary element of "thorough" or "rigorous" analysis in other jurisdictions that a court analyze applicable state laws as a

prerequisite to class certification, the converse proposition-any consideration of choice-of-law issues at class certification stage amounts to a "thorough" and "rigorous" analysis—is not necessarily true. In fact, there may be circumstances where the trial court should undertake a choice-of-law analysis to enable us to conduct a meaningful review of the certification issue on appeal. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003).

Choice-of Law and Analysis on the Merits

Newberg specifically endorses choice-of-law considerations at the certification stage, but, at the same time, states that it is not permissible to go to the merits of the case upon deciding a motion for class certification. *Newberg on Class Actions* § 4.26 (3d ed.1992). Thus, it is clear that Newberg does not equate a choice-of-law analysis with an impermissible examination of the merits of the plaintiff's claims. The majority cites *Carquest of Hot Springs, Inc. v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 916 (2006), for the proposition that requiring the circuit court to conclude at class certification which law should apply potentially strays into the merits of the action itself. In *Carquest*, the defendant/counterclaimant alleged that General Parts had engaged in an illegal tying arrangement and violated the Arkansas Franchise Practices Act. *Id.* at 220. The circuit court found that it did not have jurisdiction over Carquest's illegal-tying claim because that claim was based on the federal Sherman Anti-Trust Act, and in so finding, the court failed to consider

whether the same claim could fall within the purview of the Arkansas Unfair Practices Act (AUPA). We held that discarding Carquest's AUPA claim amounted to a ruling that the state claim could not prevail, and that ruling constituted an impermissible consideration of the merits of Carquest's state claim. *Id.* at 224. This holding does not support the majority's statement equating a choice-of-law analysis with an examination of the merits of the case. Therefore, I believe the majority's contention that *Carquest* precludes choice-of-law considerations at the class-certification stage is flawed.

GM's Choice-of-Law Argument

Here, Bryant's complaint includes claims of breach of express warranty, breach of implied warranty of merchantability, violation of the federal Magnuson-Moss Warranty Act, and fraudulent concealment of a product defect. General Motors argues that the circuit court erred in failing to consider the conflicts of laws present among the states in which GM has sold the trucks and SUVs alleged to have the parking brake defect. Before the hearing on class certification, GM presented the court with a thorough analysis of conflicts of laws regarding the state-law fraud claims, breach of warranty, applicable statutes of limitations, and unjust enrichment. It appears from a thorough reading of the circuit court's fifty-one page class certification order that the court in fact reviewed and considered GM's choice-of-law arguments, but, nevertheless, found that Bryant had satisfied the class-certification element of predominance. The circuit court went on to declare as a

matter of law that our court has interpreted Rule 23 of the Arkansas Rules of Civil Procedure as precluding a choice-of-law analysis at the class-certification stage and stated without citation that "[i]n truth, there is no greater merits-intensive determination than the one regarding choice of law. Choice of law has everything to do with a case's merits."

The majority opinion ratifies the circuit court's declaration and thereby cuts off any future possibility that a conflict of laws could defeat a finding of predominance. With this I cannot agree.

Class Certification Order

From my reading of the class certification order, I believe that the circuit court properly considered the conflict of laws argument GM presented to the court and found that the issues of law and fact common to the members of the class predominate over individual issues of law and fact. The court determined from the evidence presented at the class-certification hearing that Bryant alleges a product defect that is present at the time of manufacture on all of a set of vehicles defined in the class definition. Similarly, all class members received identical express warranties from GM, and all class members seek the same warranty remedies. Bryant presented extensive documentation of initial reports to GM of a potential defect, GMs testing and verification of the alleged product defect, and procedures by which GM addressed the alleged defect with respect to vehicles equipped with manual transmissions, while at

the same time electing not to address the alleged defect with respect to vehicles equipped with automatic transmissions. Specifically, the circuit court stated that it saw "nothing to convince it that this alleged defect is not present in all class vehicles, or that it doesn't occur or manifest itself each time a class vehicle is used." With respect to potential state-law variations, the vast majority relate to defenses raised by GM regarding the recovery of individual members, such as: application of statutes of limitations; fraud-related materiality and reliance; individual knowledge of parking brake defect; whether an individual's parking brake has been repaired under warranty; notice of warranty breach; expiration of factory warranty based on mileage; and comparative fault. The mere fact that individual issues and defenses may be raised by a company regarding the recovery of individual members cannot defeat a class certification where there are common questions concerning the defendant's alleged wrongdoing which must be resolved for all class members. *Lenders Title Co. v. Chandler, supra; Seeco Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d. 234 (1997). Here, the circuit court concluded that the "individual determinations relating to recovery or damages . . . pale in comparison to the common issues surrounding GM's allegedly defectively designed parking brake and cover up to avoid paying warranty claims." Based on the circuit court's extensive review of the evidence and its thorough findings of fact and conclusions of law, it is clear that the circuit court acted within its discretion in certifying the class of plaintiffs as defined in the court's order.

For these reasons, I concur with the majority's opinion that the circuit court did not abuse its discretion in finding that Bryant has met the requirements of Rule 23; likewise, I would affirm the circuit court's order of class certification.

CORBIN, J., joins this concurrence.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLASS CERTIFICATION, AND ORDER CERTIFYING CLASS OF THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS FILED JANUARY 11, 2007

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

NO. CV-2005-051

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS;

VS.

GENERAL MOTORS CORPORATION D/B/A CHEVROLET, GMC, CADILLAC, BUICK AND OLDSMOBILE,

DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLASS CERTIFICATION, AND ORDER CERTIFYING CLASS

I.

Introduction

This is a proposed nationwide class action brought by Plaintiff Boyd Bryant, a resident of Fouke, Arkansas. Relying mostly on admissions in Defendant GM's own

documents, Mr. Bryant, the owner of a 2002 Chevrolet Tahoe Z-71 sport utility vehicle, claims the parking brakes on nearly four million model year 1999 through 2002 GM pickup trucks and utility vehicles equipped with automatic transmissions are defectively designed in that, due to an improperly engineered spring clip retainer, they do not permit the parking brake lining to adequately float inside the parking brake drum. Mr. Bryant claims this defect exists the very moment each class vehicle rolls off its assembly line, and is persistent. That is, it reveals itself in the form of inadequate lining float each time a class vehicle is driven. Mr. Bryant further claims this lack of adequate lining float can cause additional problems relating to parking brake functionality, most significantly brake "self application" or "self energizing." Mr. Bryant describes this condition as the parking brake lining — due to the inadequate float problem — sticking out of position and making contact with the spinning parking brake drum. Mr. Bryant asserts this contact grinds down the linings to such a degree that the space between the lining and drum becomes too wide. This results in the linings and drum making no or insufficient contact when the parking brake pedal is depressed.

Mr. Bryant has asserted claims for breach of express and implied warranty of merchantability, both under the Uniform Commercial Code ("UCC") and the federal Magnusson-Moss Warranty Act. 15 U.S.C. §2301 *et seq.* He has also brought claims for unjust enrichment and fraudulent concealment because, he claims, GM knew about the defective parking brake, yet knowingly

concealed its existence from class members, including class members that had not yet purchased class vehicles. Mr. Bryant believes GM concealed the alleged defect so that the limited warranties on certain GM vehicles would expire, facilitating non-payment of warranty claims.

Claiming the parking brakes on his own Tahoe Z-71 are defective and will not hold his vehicle on a hill, and further that he was defrauded by GM, Mr. Bryant has moved for class certification. The Court has received briefing from Mr. Bryant in support of his motion. It has also received briefing from GM in support of its position that Mr. Bryant's case is not suitable for class certification. Attached to the briefing filed by both Mr. Bryant and of GM is extensive documentary evidence, nearly all of which consists of GM's own documents produced in this litigation. At the September 28, 2006 class certification hearing, over no objection from the parties, the Court admitted into evidence all documents attached to the parties' briefing. It also admitted into evidence GM's responses to Mr. Bryant's requests for admission; a GM-produced CD containing written limited warranties applicable to class vehicles; affidavits from Mr. Bryant and William Coleman[1], an expert witness retained by Mr. Bryant; and a document containing the National Highway Traffic and Safety Administration's (NHTSA) finding that it would not

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1. Attached to Mr. Coleman's affidavit were authenticated pictures of Mr. Bryant's parking brakes, as well as a DVD containing a roll demonstration involving Mr. Bryant's vehicle conducted by Mr. Bryant and Mr. Coleman.

further entertain a recall of class vehicles. Moreover, the Court received stipulations from the parties that Mr. Bryant currently owns his 2002 Chevrolet Z-71 Tahoe, that his vehicle is registered in Arkansas, and that Mr. Bryant received a typical GM three year/36,000 mile written limited warranty at the time he purchased his vehicle. Finally, GM stipulated to the Rule 23(a)(1) class-certification element of numerosity. The parties called no live witnesses to testify at the class-certification hearing.

The Court has been asked by GM to make written findings of fact and conclusions of law in connection with ruling on Mr. Bryant's motion for class certification. *See* Ark. R. Civ. P. 52. The Court has carefully taken notice of and reviewed the pleadings currently on file, the briefing and evidence submitted by the parties, and evaluated their respective oral arguments made at the September 28, 2006 hearing. The Court, exercising its discretion to do so, determines this matter is suitable for class certification under Ark. R. Civ. P. 23(a) and (b) and orders that it be certified as a class action. Its Rule 52 findings of fact and conclusion of law supporting this ruling and order are set forth herein as follows.

Appendix B

II.

Findings of Fact

1. Defendant General Motors Corporation ("GM") manufactured and sold through dealers throughout the United States the following vehicles:

> i) Model-year 1999-2004 C/K 15 Series pickup trucks with a Gross Vehicle Weight Rating ("GVWR)" of less than or equal to 6400 lbs. (with the exception of 2003-2004 Silverado SS model);
>
> ii) Model-year 1999-2004 C/K 15 Series SUV/ UUVs with a GVWR of less than or equal to 7200 lbs.;
>
> iii) Model-year 2002 K15706 Cadillac Escalade and 2002 K15936 Cadillac Escalade.

P. Exh. "1", p. 1. The "C" signifies two-wheel drive, while "K" signifies four-wheel drive. P. Exh. "22", p. 101, lines 14-23.

2. GM collectively describes these vehicles as "1500 Series pickups and utilities." P. Exh. 2, *passim;* Exh. 9, *passim;* P. RFA Answers 1-5. GM also refers to these vehicles as "GMT 800 1500 Series vehicles."[2]

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2. The Court will adopt GM's terminology and refer to the vehicles described in paragraph 1. above as "1500 Series pickups and utilities".

Appendix B

3. All 1500 Series pickups and utilities were originally equipped, manufactured and sold by GM with a single shoe, PBR 210x30 Drum-in-Hat parking brake system. P. Exh. "2", GM000036104 ("The entire population of 1500 Series vehicles is equipped with the PBR single-shoe parking brake system with the exception of certain crew cab models."); P. RFA Answers 1-5.

4. GM is responsible for integrating the PBR 210x30 Drum-in-Hat park brake system into these vehicles. P. Exh. "2", GM000036113; P. Exh. "9", p. 11 of 13; P. Exh. "23", p. 34 (lines 5-9).

5. The PBR 210x30 Drum-in-Hat parking brake system in 1500 Series pickups and utilities is operated by foot pedal near the vehicle floor to the left of the accelerator pedal and service brake. It has an intended use as a parking assist device to be used in conjunction with the transmission in its "park" position (automatic transmission) or in reverse gear (manual transmission). P. Exh. "8", GM000036753; P. Exh. "15", GM000025715; P. Exh. "22", p. 145 (lines 18-25); 146 (lines 1-11); P. Exh. "23", p. 88 (lines 4-9).

6. In numerous places in its owners' manuals for 1500 Series pickups and utilities, GM cautions "[i]t is dangerous to get out of your vehicle if the shift lever is not fully in PARK (P) with the parking brake firmly set. Your vehicle can roll." P. Exh. "24", pp. 2-32; 2-39; 2-41; 2-42; 4-89; P. Exh. "15", GM000025718. Given this language — which makes no distinction between manual

and automatic transmission vehicles — the Court finds the parking brake, even on automatic transmission vehicles, is not a superfluous item as GM seems to suggest in its briefing.[3]

7. GM expects people will use their owner's manuals. The information is there for their benefit in how to maintain their vehicle and how to operate their

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3. As additional support for the idea that parking brakes on GM vehicles are not unnecessary, even on automatic transmission vehicles, the GM Vehicle Technical Specifications (VTS) for model-year 1999-2002 1500 Series pickups and utilities specify the park brake *shall* hold the vehicle stationary at Gross Vehicle Weight (GVW) with the transmission in neutral. P. Exh. "15", GM000025714; P. Exh. "19", VTS 3.2.1.13.7.1 "Vehicle Parking Gradeability" ("The park brake shall hold the vehicle stationary at GVW, with the transmission in neutral."); P. Exh. "23", p. 46 (line 25); p. 47 (lines 1-20). Moreover, without distinguishing between manual and automatic transmission vehicles, the GM VTS applicable to the model-year 1999-2002 1500 Series pickups and utilities require the PBR 210x30 Drum-in-Hat parking brake system to enable and endure a total of 20 simulated police style U-turns without loss of function. P. Exh. "19", VTS 3.2.1.5.7.2 "Simulated Police-Style U-turns". The applicable VTS also require the parking brake system to enable and endure 4 dynamic stops at 60 mph without loss of function. P. Exh, "19", VTS 3.2.1.5.7.3 "Dynamic Park Brake Stop". Finally, federal motor vehicle safety regulations governing vehicles such as model-year 1999-2002 1500 Series pickups and utilities state such vehicles "shall be manufactured with a parking brake system of a friction type with a solely mechanical means to retain engagement." P. Exh. "20". GM has admitted that if its vehicles do not meet federal safety standards, it cannot sell such non-compliant vehicles. P. Exh. "23", p. 49 (lines 2-5)

vehicle. P. Exh. "22", p. 127 (lines 10-18). GM owners' manuals, as a general proposition, prescribe how GM believes 1500 Series pickups and utilities should ordinarily be used by their owners or operators. P. RFA Answer 54.

8. Most vehicles with automatic transmissions experience infrequent parking brake application by their owners, drivers, or users in normal operations. P. RFA Answer 56.

9. The parking brake's linings, made of a friction material known as T103, sit inside a hollow metal cylinder or drum attached to the inboard portion of the vehicle's wheel. Exh. "23", p. 94 (lines 20-24). When the wheel turns, the drum (also referred to as a "rotor") likewise turns. When the parking-brake foot pedal is depressed a cable-actuated piston causes the parking brake's linings to travel or expand outward and contact the inner portion of the drum. *See* P. Exh. "8", GM000036753. The design intent is that the contact of the parking brake's lining with the drum will, as a matter of friction and torque, prevent the wheel from turning and hold the vehicle motionless while parked, even if the transmission is in neutral or out of gear. *Id.*

10. The PBR 210x30 Drum-in-Hat parking brake system on 1999-2002 model-year 1500 Series pickups and utilities was originally assembled and distributed with what GM calls a "high-force spring clip retainer." P. Exh. "6", GM000036718.

Appendix B

11. The specific GM model codes for the 1999-2002 model-year 1500 Series pickups and utilities containing parking brakes with high-force spring clip retainers are as follows:

1500 Series Pickup:	C-K15703 (MY 99-02)
	C-K15753 (MY 99-02)
	C-K15903 (MY 99-02)
	C-K15953 (MY 99-02)
1500 Series Utility:	C-K 15706 (MY 00-02)
	C-K15906 (MY 00-02)
	C-K15936 (MY 02 only)

P. Exh. "6", GM000036718. In light of GM's 2005 recall of manual transmission vehicles, discussed *infra*, the automatic-transmission versions of these vehicles are the only ones at issue in Mr. Bryant's proposed class action. That is, the automatic-transmission versions of these model-coded vehicles are the class vehicles.[4]

12. The function of the spring-clip retainer is to ensure the parking brake linings, when not in use, are retracted and properly positioned — concentric with the drum — such that when the foot pedal is depressed and the linings travel outward, they are properly centered and make contact with the correct place on the interior of the drum. P. Exh. "8", GM000036754.

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4. GM manufactured 3,905,481 model-year 1999-2002 1500 Series pickups and utilities vehicles with automatic transmissions and equipped with parking brakes containing high-force spring clip retainers. P. Exh. "2", GM000036106.

13. GM admits the high-force spring clip retainer installed on model-year 1999-2002 1500 Series pickups and utilities does not function properly in that it exerts more retaining force than aligning forces tending to center the parking brake linings in relation to the drum. P. Exh. "2", GM000036107; P. Exh. "8", GM000036754; P. Exh. "9", p. 2 of 13; P. Exh. "23", p. 77 (lines 1-18); p. 78 (lines 1-7).

14. The exertion of excessive retaining force is also characterized by GM as the high-force spring clip retainer not allowing the brake shoe and attached linings to "float" inside the drum and remain concentric with the drum. P. Exh. "2", GM000036102; P. Exh. "9"; P. Exh. "30", GM000038052; P. Exh. "3", GM000036624. Mr. Bryant contends this alleged inadequate shoe/lining float problem is the principle result of the defectively designed high-force spring clip retainer. Mr. Bryant claims the inadequate shoe/lining float problem exists the very moment each class vehicle rolls off its assembly line, and is persistent. That is, it reveals itself each time a class vehicle is driven. Based on a review of Mr. Bryant's cited evidence, and the evidentiary record as a whole, the Court agrees with Mr. Bryant and finds the high-force spring clip retainer, if it is indeed defectively designed (an issue ultimately to be determined by the trier of fact), to create a common, inadequate shoe/lining float problem in all class vehicles, which is persistent, which occurs each time a class vehicle is driven, and which exists, if at all, from the time class vehicles roll off their respective assembly lines.

15. This exertion of excessive retaining force by the high-force spring clip retainer can result in a loss of concentricity between the linings and drum. P. Exh. "2", GM000036102; P. Exh. "9", p. 4 of 13 This loss of concentricity, which may be prompted by inertia-induced movement of the parking-brake linings during vehicle travel, rough road inputs, and/or axle deflection occurring during certain vehicle cornering or loading conditions[5], can also allow or further result in unintended, intermittent contact between the parking

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5. With regard to inertia-induced movement of the parking-brake linings, and how it affects parking brake performance on 1999-2002 model-year 1500 Series pickups and utilities, GM has further admitted to additional design-related shortcomings regarding the PBR 210x30 Drum In Hat parking brake system. First, it has admitted to design failure in that load-induced axle shaft deflection under high-g cornering was not comprehended as a cause of potential parking brake lining wear in the Design Failure Mode Effects Analysis (DFMEA), and that such failure to comprehend is something representing a process non-existent, inadequate or missed by GM. Exh. "2", GM000036107; Exh. "7"; Exh. "9", p. 11 of 13. Similarly, GM has admitted design failure in that the Subsystem Technical Specification (STS) for 1999 through 2002 model year 1500 Series pickups and utilities did not contain a maximum allowable limit for axle shaft deflection, and that such omission is something representing a process non-existent, inadequate or missed by GM. Exh. "2", GM000036107; Exh. "7"; Exh. "9", p. 11 of 13. Finally, GM has admitted design failure in that in the pre-production design phase it did not adequately test or perform durability validation with respect to the PBR 210x30 Drum-in-Hat parking brake system in 1999 through 2002 model year 1500 Series pickups and utilities vehicles. Exh. "2", GM000036107; Exh. "7"; Exh. "9", p. 11 of 13.

brake linings and drum during vehicle travel. P. Exh. "2", GM000036107; P. Exh. "8", GM000036754; P. Exh. "9", pp. 1 and 2 of 13; P. Exh. "15, GM000025715; Exh. "23" (lines 3-22)(". . . . [a] severe pothole or some other intertial event [] would move the park brake out of its center position, and then this original clip might not allow it to return back to that center position as readily."); P. RFA Answer 35.

16. This unintended, intermittent contact between the linings and drum during travel — a condition GM has termed parking brake "self-application" or "self-energizing" — essentially grinds down the parking brake lining and promotes excessive, premature lining wear. *See* P. Exh. "2", GM000036102; P. Exh. 3, GM000036624 ("Park brakes are wearing out due to 'self energizing.'"); P. Exh. "8", GM000036754 ("Relative motion of the drum during driving acts to self-energize the brake so as to maintain drum/lining contact and may occur even in the absence of a parking brake application."); P. Exh. "9", p. 2 of 13; P. Exh. "15, GM000025715; P. Exh. "23", p. 83 (lines 6-16) ("The self-energizing is where you get contact between the linings and the rotor that, due to the direction of rotation of the rotor, it tends to pull the lining in. It creates more contact rather than pushing it away.").

17. Excessive lining wear results in too large of a gap between the lining and the drum such that depressing the park brake will not cause the lining to travel far enough to make sufficient contact with the drum and hold the vehicle motionless. P. Exh. "2",

GM000036107; P. Exh. "9", pp. 1 and 2 of 13. In GM's own words, parking brake "[l]ining wear can increase the clearance between the linings and the parking brake drum to a point where the required apply lever travel and associated shoe travel exceed the design capabilities of the apply system, reducing its ability to generate sufficient park brake torque to hold the vehicle motionless." P. Exh. "2", GM000036107; P. Exh. "9", pp. 1 and 2 of 13; P. Exh. "15, GM000025716.

18. GM has also admitted the design of the PBR 210x30 Drum-in-Hat parking brake system with the high force spring clip retainer is ". . . . less than optimal because it is overly sensitive to proper lining-to-drum clearances." P. Exh. "2", GM000036107; P. Exh. "7"; P. Exh. "9", p. 11 of 13. The Court finds this admission to describe an additional potential design defect in the PBR 210x30 Drum-in-Hat parking brake system in model year 1999-2002 1500 Series pickups and utilities. This potential defect is significant, given GM's apparent position, based on the affidavit of Jason Petric, that the parking brake linings on Mr. Bryant's vehicle were not excessively worn, but rather were merely out of adjustment and gapped too far away from the brake drum. Even if GM is correct (the Court does not believe it is, especially based on the contents of William Coleman's affidavit and measurements on Mr. Bryant's vehicle Mr. Coleman made), the Court finds the condition of the PBR 210x30 Drum-in-Hat parking brake system being overly sensitive to proper lining to drum clearances is yet another example of a universal, alleged defect in all class vehicles that persistently exists and is actionable on a class-wide basis.

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19. GM maintains a Problem Resolution Tracking System ("PRTS"). P. Exh. "22", p. 63, lines 17-25. The PRTS was triggered regarding the parking brake due to higher-than-expected-warranty claims. *Id.* at 64, lines 15-19.

20. The PRTS regarding the defective parking brakes "was initiated at the end of 2000 and was assigned to engineering in early 2001." P. Exh. "22", p. 64, lines 20-25; p. 65, lines 1-5.

21. The GM Truck Group began 5-Phase Action plan CK800U0331 regarding defective parking brakes on January 29, 2001. P. Exh. 29. In the written document corresponding to that plan, GM noted the park brake "[s]ystem was found in many cases to not be able to hold after a low amount of miles (2500-6000). This condition was found in the system 2A and 2B park brakes."[6] *Id.*, GM000037499.

22. The component manufacturer of the parking brake, PBR Banksia ("PBR"), performed testing on the PBR 210x30 Drum-in-Hat parking brake system originally utilized in 1999 through 2002 model year 1500 Series pickups and utilities. From its testing it concluded that at 10,048 miles the defective parking brakes needed a first adjustment and that at 27,273 miles the defective parking brakes' linings wear to steel. P. Exh. "10" (bar chart entitled "Wear Life Comparison, Original T800,

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6. The "system 2A and 2B park brakes" are in essence the PBR 210x30 Drum-in-Hat parking brake system. P. Exh. "1".

Low Load, Twin Clip"); P. Exh. "23", p. 23 lines 3-25; p. 24 (entire); p. 25 (lines 1-10); p. 26 (lines 22-25); p. 27 (lines 1-10). PBR has actually estimated the parking brake lining life in 1999-2002 model year 1500 Series pickups and utilities, due to the alleged defect, to be a mere 30,000 to 35,000 miles, only 1/5 of the expected life of such vehicles, and before expiration of the 36,000 mile written limited warranty provided by GM to vehicle purchasers. P. Exh. "11" ("Lining Life Estimates: Original design = 30-35,000 miles"); P. Exh. "25", p. 7 (Section entitled "1999 General Motors Corporation New Vehicle Warranty").

23. GM expects the life of all 1500 Series pickups and utilities to be 10 years of exposure or 150,000 miles. P. Exh. "19", VTS 3.2.1.1 "Target Life"; P. Exh. "22", p. 124 (lines 11-14); P. Exh. "23", p. 27 lines 23-25; p. 28 (lines 1-4). No criteria or performance standards concerning expected mileage or months of service of the parking brake, including parking brake linings, is set forth in the GM Vehicle Technical Specification (VTS) or GM Sub-System Technical Specification (SSTS) for 1500 Series pickups and utilities. P. Exh. "15", GM000025714; P. Exh. "16", GM000029872; P. Exh. "19"; P. Exh. "22", p. 66 (Lines 1-17). Similarly, the VTS for 1500 Series pickups and utilities indicates parking brake linings are not considered items that will "wear out" or are "wear out items". Exh. "19", VTS 3.2.3.1. "Wearout Items"; VTS 3.2.3.1.1 "Brake Wearout Items"; Exh. "22", p. 72 (lines 18-25); p. 73 (line 1) ("The park brake, if adjusted correctly and maintained, I believe the expectation is that they will not wear out based on them

not being on this wear-out item matrix."); Exh. 23, p. 28 (lines 2-7) (Question: "Is it your understanding that the park brake linings are supposed to last [the 150,000 mile target life of the vehicles]?" Answer: "Yes"). On the other hand, a performance standard of 40,000 miles for the service brake linings is prescribed in the GM Vehicle Technical Specification (VTS) for 1500 Series pickups and utilities. Exh. "19", VTS 3.2.3.1.1 "Wearout Items"; Exh. "22", p. 66 (lines 18-25; 67 lines 1-10; p. 70, lines 12-22). In the Court's mind, the only inference that can be drawn from these omissions and the existence of a specific standard for service brakes is that GM has always expected the parking brake linings on these vehicles to last the expected vehicle life, *ie.* 10 years of exposure or 150,000 miles. Indeed, GM's own VTS confirms this, stating the "Target Life" of the parking brake is essentially 10 years of exposure of 150,000 miles. P. Exh. "19", 3.2.3.1 "Target Life".

24. In October 2001 GM concluded the design of the parking brake, including its spring clip retainer, was faulty. P. Exh. "2", GM000036102; P. Exh. 9, p. 4 of 13.

25. On October 19, 2001 GM initiated an Engineering Work Order (EWO) to release a spring clip retainer with lower retaining force. P. Exh. "2", GM000036102, GM000036106, GM000036109; P. Exh. "9", p. 4 of 13. This release was effective with 2003 model year start of production. *Id.* ; P. RFA 82 Answer.

26. GM believed the reduced force spring clip retainer would ". . . . minimize the lining self energizing

by allowing the lining to float easier and not "stick" to the inside of the rotor during operation on rough roads." P. Exh. "30", GM000038052.

27. The implementation of the low-load or reduced force spring clip retainer beginning with model year 2003 1500 Series pickups and utilities has effectively eliminated the intermittent contact condition between the parking brake lining and the parking brake surface or drum during vehicle travel. P. Exh. "9", p. 4 of 13 ("Implementation was effective with 2003 start of production, after which the warranty repair rate due to lining wear became insignificant."); P. Exh. "23", p. 77 (lines 1-18); p. 78 (lines 1-7).

28. All 1999 through 2002 model year 1500 Series pickups and utilities are covered by a GM bumper-to-bumper new vehicle warranty for three (3) years or 36,000 miles. P. Exh "15", GM000025710 ("The subject vehicles, with the exception of the Cadillac vehicles, are covered by a bumper-to-bumper new vehicle limited warranty for three years or 36,000 miles whichever occurs first.); P. Exh. "16", GM000029865 ("The subject vehicles, with the exception of the Cadillac vehicles, are covered by a bumper-to-bumper new vehicle limited warranty for three years or 36,000 miles whichever occurs first. The Cadillac subject vehicles are covered by a bumper-to-bumper new vehicle limited warranty for four years or 50,0000 miles whichever occurs first"); Exh. "25", pp. 7-11 (Section entitled "1999 General Motors Corporation New Vehicle Warranty"); GM CD containing warranty booklets admitted into evidence at

the class-certification hearing. In relevant part, the limited warranty language regarding coverage is as follows:

> **WHAT IS COVERED**
>
> **WARRANTY APPLIES**
>
> THIS WARRANTY IS FOR GM VEHICLES REGISTERED IN THE UNITED STATES NORMALLY OPERATED IN THE UNITED STATES OR CANADA, AND IS PROVIDED TO THE ORIGINAL AND ANY SUBSEQUENT OWNERS OF THE VEHICLE DURING THE WARRANTY PERIOD.
>
> **REPAIRS COVERED**
>
> THE WARRANTY COVERS REPAIRS TO CORRECT ANY VEHICLE DEFECT RELATED TO MATERIALS OR WORKMANSHIP OCCURRING DURING THE WARRANTY PERIOD. NEEDED REPAIRS WILL BE PERFORMED USING NEW OR REMANUFACTURED PARTS.
>
> **WARRANTY PERIOD**
>
> THE WARRANTY PERIOD FOR ALL COVERAGES BEGINS ON THE DATE THE VEHICLE IS FIRST DELIVERED OR PUT IN USE AND ENDS AT THE EXPIRATION OF THE COVERAGE PERIOD.

Appendix B

BUMPER-TO-BUMPER COVERAGE

THE COMPLETE VEHICLE IS COVERED FOR 3 YEARS OR 36,000 MILES, WHICHEVER COMES FIRST. . . .

NO CHARGE

WARRANTY REPAIRS, INCLUDING TOWING, PARTS AND LABOR, WILL BE MADE AT NO CHARGE, LESS ANY APPLICABLE DEDUCTIBLE.

OTHER TERMS: THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

GENERAL MOTORS DOES NOT AUTHORIZE ANY PERSON TO CREATE FOR IT ANY OTHER OBLIGATION OR LIABILITY IN CONNECTION WITH THESE VEHICLES. **ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY. PERFORMANCE OF REPAIRS AND NEEDED ADJUSTMENTS IS THE EXCLUSIVE REMEDY UNDER THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY. GENERAL MOTORS SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (SUCH AS, BUT NOT LIMITED TO, LOST WAGES OR VEHICLE RENTAL EXPENSES) RESULTING FROM THE BREACH OF THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY.**

The Court finds this coverage language is identical in material respects for all 1999 through 2002 model year 1500 Series pickups and utilities. *Id.*

29. On September 17, 2002 (eleven months after issuance of the GM engineering work order to re-engineer the high-force spring clip retainer) GM released technical service bulletin #2-05-26-011 to its dealers. P. Exh. "22", p. 46, lines 2-7. In this bulletin it was noted "[a] rear parking brake retaining spring clip kit has been released for service." Significantly, however, it also stated "Important — The spring clip kits mentioned in this bulletin do not address any parking brake concerns." Exh. "13" The Court finds, as Mr. Bryant has argued, that this language is troubling and can be construed as an effort on GM's part to conceal — to the detriment of all class members — its responsibility for problems with the PBR 210x30 Drum-in-Hat parking brake system to avoid paying warranty claims. To begin with, the Court does not understand why GM waited eleven (11) months after it re-engineered the high-force spring clip retainer on October 19, 2001 to issue a bulletin regarding vehicles that had been manufactured with the high-force clip. For the bulletin to then contain this language, in the Court's view, is triable evidence GM wanted to conceal its responsibility for the design problem from all class members. The fact the three-year GM limited warranties were beginning to expire in August 2001 only reinforces the Court's view that GM's conduct may have been inappropriate, designed either to avoid paying warranty claims or to induce prospective sales of class vehicles.

30. On January 28, 2003 — roughly two years after GM engineering received notice of parking brake problems — GM published technical service bulletin 02-05-26-002A and sent it to dealers. It was in this service bulletin that GM first acknowledged to outside entities such as dealers that scraping noise from the rear of vehicles "may [sic] due to the parking brake shoe contacting the drum in hat rotor without the parking brake being applied, causing premature wear on the shoe lining." P. Exh. "2", GM000036109; P. Exh. "14"; P. Exh. "22", p. 46.

31. In December 2003 the National Highway Traffic and Safety Administration (NHTSA) issued Preliminary Evaluation Information Request ("IR") PE03-057 regarding allegations of parking brake ineffectiveness on model year 1999-2003 full-size pickup trucks built on the GMT 800 platform and equipped with manual transmissions and drum-in-hat parking brakes. P. Exh. "2", GM000036103; P. Exh. "9", p. 4 of 13

32. In mid-February 2004 GM provided a response to the NHTSA IR and thereafter engaged in vehicle testing regarding the defective parking brake. P. Exh. "2", GM000036103; P. Exh. "15".

33. On November 18, 2004 NHTSA issued engineering analysis IR EA04-011, which expanded the scope of the initial IR to include all model year 1998-2004 full-size pickup trucks and utilities built on either the GMT 400 or GMT 800 platform and equipped with either a manual or automatic transmission. P. Exh. "2", GM000036102.

Appendix B

34. The primary concern of the NHTSA investigation directed at the PBR 210x30 Drum-in-Hat parking brake system in 1999 through 2002 model year 1500 Series pickups and utilities was vehicle rollaways. P. Exh. "8", GM000036756.

35. On April 18, 2005, after the issue of the defective parking brake was presented to the Senior Management Committee, GM's Field Action Decision Committee decided to conduct a safety recall. P. Exh. "17", p. 2

36. On April 20, 2005 GM sent NHTSA written notification of this decision. P. Exh. "17" In that correspondence GM stated "General Motors has decided that a defect, which relates to motor vehicle safety, exists in certain 1999-2002 UK. Series (PBR parking brake system) . . . pickups with manual transmissions. Some of these vehicles have a condition in which the parking brake friction linings may wear to an extent where the parking brake can become ineffective in immobilizing a parked vehicle." P. Exh. "17", p. 1

37. In July 2005 GM issued Recall Bulletin 05042, which applied only to manual transmission versions of 1999-2002 1500 Series pickups and utilities. P. Exh. "18".

38. GM projected the cost to recall only 1999-2002 1500 Series pickups and utilities manual transmission vehicles with defective parking brakes to be $6,645,793. P. Exh. "4", GM000036679-80.

39. In contrast, GM projected the cost to recall both the manual and automatic transmission version of such vehicles to be fifty (50) times greater, or $350,083,047. P. Exh. "4", GM000036679-80.

40. To date GM has neither contacted owners of nor recalled any of the 3,905,481 model-year 1999-2002 1500 Series pickups and utilities with automatic transmissions, the class vehicles here, based on parking brake concerns. Exh. "22", p. 39, lines 13-17; p. 42, lines 7-10.

41. The PBR 210x30 Drum-in-Hat park brake system utilized in manual transmission 1999-2002 1500 Series pickups and utilities is identical to the PBR 210x30 Drum-in-Hat park brake system installed on automatic-transmission 1999-2002 1500 Series pickups and utilities. Moreover, "the same physical parking brake wear mechanism is also present on vehicles with automatic transmissions. . . ." P. Exh. "5"; P. Exh. "22", p. 43, lines 5-9; P. P. Exh. "23", p. 36 (lines 20-25); p. 37 (lines 1-25); p. 38 (lines 1-8).

42. The remedy in Recall Bulletin 05042 is that GM instructs dealers to "inspect the parking brake lining thickness on both rear brakes, and depending on the amount of lining remaining, install either a reduced force parking brake retainer spring clip on both rear brakes or parking brake shoe kits, which includes the reduced force clip." P. Exh. "18", p. 1.

43. In all cases GM's recall remedy is to supply a reduced force spring clip retainer. *Id.* This is consistent

with GM's belief that implementation of the low-load or reduced force spring clip retainer beginning with model year 2003 1500 Series pickups and utilities effectively eliminates the intermittent contact condition between the parking brake lining and the parking brake surface or drum during vehicle travel.

44. GM's recall test for excessive lining wear is that the parking brake lining thickness must equal or exceed 1.5 millimeters (.06 inches) in at least 6 places on each side of the vehicle. P. Exh. 2, GM000036108; P. Exh. "18", p.4. As per GM's recall materials, in the event parking brake lining thickness is less than 1.5 millimeters (.06 inches) on any of at least 6 places on each side of the vehicle, GM instructed its dealers to install a new parking brake lining on both sides of the vehicle. Exh. 2, GM000036108; Exh. "18", p.4.

45. In sum, if the linings are not sufficiently worn, Recall Bulletin 05042 only entails installation of a reduced force parking brake retainer spring clip on both rear brakes. However, if the linings are excessively worn, the recall requires both the replacement of the linings and a reduced force spring clip retainer.

46. GM's dealer sales and service agreement requires its dealers nationwide to perform recall-related repairs. P. RFA Answer 157.

47. GM has estimated .9 hours per vehicle at an hourly labor rate of $71.19 to represent labor costs in terms of dealers inspecting and correcting the parking

brake defect. P. Exh. "2", GM000036115; *see also* P. Exh. "4", GM000036679-80; P. RFA Answer 153.

48. GM has estimated $4.93 to represent its cost for corrective parts, per vehicle, in tends of dealers inspecting and correcting the parking brake defect. P. Exh. "2", GM000036115; *see also* P. Exh. "4", GM000036679-80; P. RFA Answer 154.

49. GM has estimated $1.00 per initial notice letter per vehicle (First Class Mail) and $0.36 for "customer follow up" per vehicle as administrative costs associated with dealers inspecting and correcting the parking brake defect. P. Exh. "2", GM00003 6 1 1 5; *see also* P. Exh. "4", GM000036679-80; P. RFA Answer 155.

50. On May 10, 2005 NHTSA's Office of Defect Investigations (ODI) issued an "ODI Resume" and "Engineering Analysis Closing Report" closing its engineering analysis Investigation EA 04-011 regarding the defective parking brakes. P. Exh. "8"

51. NHTSA closed the investigation because it determined vehicle rollaways — again, the primary concern of the investigation — would be prevented by GM's recall of manual-transmission 1999-2002 1500 Series pickups and utilities. P. Exh. "8", GM000036756-000036757.

52. In closing its investigation NHTSA stated, "The Engineering Analysis is closed because GM's recall action will remedy the defect condition in the MY 1999-

2003 C/K 1500 pickup trucks equipped with manual transmissions." P. Exh. "8", GM000036757.

53. As demonstrated by responses to NHTSA and the recall campaign in general, GM has the ability to conduct a Vehicle Identification Number (VIN) search within its internal databases and identify the name, address and telephone number of each original purchaser or owner of 1999 through 2002 model year 1500 Series pickups and utilities. P. Exh. "15", GM000025708; *see also* P. RFA Answers 97-101.

54. In addition, on-line internet access at GM's owner website, *www.mygmlink.com*, provides a way for owners of 1999 through 2002 model year 1500 Series pickups and utilities to obtain personalized information for their specific vehicles. GM controls the format and content of this website, with some limitations. P. Exh. "17", p. 16; *see also* P. RFA Answers 159-161.

55. GM also has the ability to obtain contact information (name and address) for current or used vehicle owners by contacting an "outside supplier" and having it obtain registration information for all desired or affected VINs. P. Exh. "22", p. 38, lines 14-25.

56. On April 4, 2002 Plaintiff Boyd Bryant, at the time and currently a resident of Fouke, Miller County, Arkansas, purchased and took delivery of a new 2002 Chevrolet Tahoe Z-71, VIN 1GNEK13282R268414 ("the Bryant vehicle") from Tom Morrick Chevrolet, Inc. in Ashdown, Arkansas. P. Exh. "26". By stipulation of the

parties, Mr. Bryant received a standard GM three-year/36,000 mile written limited warranty (as identified and discussed above) at the time he purchased the Bryant vehicle.

57. Mr. Bryant presently owns the Bryant vehicle; it has approximately 81,000 miles on it.

58. The Bryant vehicle falls within the description of 1999 through 2002 model year 1500 Series pickups and utilities and, more particularly, is one of the "utilities" in that description.

59. The Bryant vehicle was originally equipped with a PBR 210x30 Drum-in-Hat park brake system utilizing high-force spring clip retainers. P. Exh. "28", p. 8 (". . . . the parking brake on Mr. Bryant's vehicle was a PBR parking brake."). The Bryant vehicle is still equipped with a PBR 210x30 Drum-in-Hat park brake system utilizing high-force spring clip retainers. *See* photographs attached to William Coleman's affidavit.

60. Plaintiff's engineer expert, William Coleman, measured the parking brake lining thickness on the Bryant vehicle, and in at least one place on the passenger side it is less than 1.5 millimeters (.06 inches). *See* William Coleman affidavit; photographs attached to and authenticated by Mr. Coleman's affidavit. Based on this measurement, the Court finds the Bryant vehicle is exhibiting lining wear consistent with the inadequate lining float Mr. Bryant alleges is associated with GM's use of the high-force spring clip retainers.

Appendix B

61. Mr. Coleman also tested the Bryant vehicle for parking brake functionality. With the parking brake fully depressed and the transmission in neutral, the Bryant vehicle rolls on both steep and lesser hills or grades. William Coleman affidavit; *see* DVD containing videotaped footage of the hill testing of the Bryant vehicle. Accordingly, the Bryant vehicle[7] is exhibiting

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7. According to GM, the 1500 Series utilities like the Bryant vehicle (i.e. sport utility vehicles such as Chevrolet Tahoes and Suburbans, and GMC Yukons and Yukon XLs) have experienced the defect-related premature lining wear more than any other category of vehicles in the 1999 through 2002 model year 1500 Series pickups and utilities class of vehicles. P. Exh. "5". By GM's own admission, the reason the 1999-2002 1500 series utilities are more prone to poor parking brake performance is that 1500 Series utilities have the following unique design characteristics or traits:

> _ Small axle shaft diameters relative to other vehicles in the 1999 through 2002 model year 1500 Series pickups and utilities class of vehicles;
>
> _ The highest GVW ratings relative to other vehicles in the 1999 through 2002 model year 1500 Series pickups and utilities class of vehicles;
>
> _ The greatest unladen weights relative to other vehicles in the 1999 through 2002 model year 1500 Series pickups and utilities class of vehicles,
>
> _ They have coil-spring suspensions with unique spring and shock absorber calibrations

(Cont'd)

lack-of-parking-brake functionality consistent with the presence of the defect associated with GM's use of the high-force spring clip retainers.

62. As per his affidavit, Mr. Bryant has reviewed the original and amended pleadings in this matter, and understands the allegations against GM. He also understands his duties and obligations as a class representative and has testified that he has complied with them by, among other things, giving a deposition in this case, assisting with written discovery answers, and by staying in touch with representative counsel during this litigation to keep aware of status and progress of this lawsuit. In that vein, the Court notes Mr. Bryant not only participated in at least two inspections of Z-71 Tahoe, as well as a roll test of this vehicle, but he also attended part of the class-certification hearing, even though it occurred on one of his off days from his employment.

63. Mr. Bryant further agrees to fairly and adequately represent other members of any designated

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(Cont'd)

> compared to other vehicles in the 1999 through 2002 model year 1500 Series pickups and utilities class of vehicles.

P. Exh. "2", GM000036106; Exh "5". These factors subject the 1500 Series utilities to greater parking brake shoe inertia and axle shaft deflection, resulting in accelerated parking brake lining wear. *Id.*

class with similar claims and damages because of the importance that all benefit from this lawsuit equally.

64. Finally, he states there is no collusion or conflicting interest between members of the proposed class and him.

III.

Conclusions of Law

A. Mr. Bryant's Class Definition.

1. Before the six (6) criteria for class certification under Rule 23 are analyzed, the trial court must determine whether a class, in fact, exists. *E.g. State Farm Fire & Cas. Co. v. Ledbetter*, 355 Ark. 28, 129 S.W.3d 815 (2003). A class must be susceptible to precise definition. Its description must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class, and the identity of the class members must be ascertainable by reference to objective criteria. *Arkansas Blue Cross and Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002). Part of the "objective criteria" requirement is that a class may not be defined in a manner that would require the trial court to inquire into the merits of each class member's case in order to determine whether he is a suitable class member. *Ledbetter*, 355 Ark. at 37.

2. Mr. Bryant has moved under Ark. R. Civ. P. 23 for certification of the following nationwide class of GM vehicle owners:

> ***"Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in-Hat parking brake system utilizing a high force spring clip retainer[8], that registered his vehicle in any state in the United States.***

Excluded from Mr. Bryant's proposed class are the following individuals or entities:

> a. Individuals or entities, if any, who timely opt out of this proceeding using the correct

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8. The term "1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in-Hat parking brake system utilizing a high-force spring clip retainer" as utilized in his class definition refers to the following GM model-year and model-coded vehicles equipped with automatic transmissions:

1500 Series Pickup:	C-K15703 (MY 99-02)
	C-K15753 (MY 99-02)
	C-K15903 (MY 99-02)
	C-K15953 (MY 99-02)
1500 Series Utility:	C-K15706 (MY 00-02)
	C-K15906 (MY 00-02)
	C-K15936 (MY 02 only)

protocol for opting out that will be formally established by the Court;

b. Any and all federal, state, or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;

c. Any currently sitting Arkansas state court judge or justice in the current style and/or any persons within the third degree of consanguinity to such judge or justice;

d. Any person who has given notice to GM, by service of litigation papers or otherwise, and alleged he or she has suffered personal injury or collateral property damage due to an alleged defect in any braking component, including the parking brake, in 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in-Hat parking brake system utilizing a high-force spring clip retainer;

e. Any person, "owner", or "subsequent owner" whose GM vehicle was included in GM's July 2005 recall bulletin No. 05042, or any supplements or amended versions of that bulletin that have previously been issued.

3. The Court concludes the nationwide class for which Mr. Bryant seeks certification both exists and is susceptible to precise definition. The terms "owners" and "subsequent owners" are taken from GM's own warranty publications. Thus GM cannot complain of the class not being susceptible to precise definition, nor of it not being ascertainable by reference to objective criteria. Moreover, GM has admitted it has the ability to provide personal information (name, address, telephone number) regarding original vehicle purchasers via its warranty database, as well as current vehicle owners via third party vendors that conduct VIN searches. Finally, the fact GM has conducted a recall on the manual-transmission versions of class vehicles demonstrates it is administratively feasible for GM not only to identify class members, but also to contact them.

4. GM contends the class is not susceptible to precise definition because class member status is dependent upon "when the alleged damage (parking brake failure) occurred." GM also contends Mr. Bryant's class definition is flawed because it "continu[es] to shift on a daily basis as large numbers of the four million vehicles are sold. . . ." Both of GM's arguments lack merit. First, the Court has concluded the "failure" as alleged by Mr. Bryant — the inadequate lining float — occurs from day one off the assembly line. Consequently, all "owners" and "subsequent owners" experienced the "failure" at delivery and are continuing to experience it, if it is ultimately proven to exist. There is no single post-purchase date of "failure" which might taint Mr. Bryant's class definition here. As for GM's other

argument, there will obviously be some daily shift in class vehicle ownership that may occur. But this would be the case in most any products-based class action. The Court fails to see how this shift in product ownership, alone, provides any basis to attack Mr. Bryant's class definition. GM has admitted its warranty database provides the identity of and contact information for all original owners of class vehicles. In addition, GM personnel have admitted third-party firms can conduct VIN searches and obtain a snapshot regarding present owners of class vehicles. So there are numerous ways to objectively determine the individuals that are members of Plaintiff's proposed class. GM's concerns are unwarranted.

B. Rule 23(a)(1) Numerosity.

5. As noted, GM has stipulated to the Rule 23 element of numerosity. The Court accepts this stipulation and concludes the nationwide class proposed by Mr. Bryant is sufficiently numerous to satisfy Ark. R. Civ. P. 23(a)(1).

C. Rule 23(a)(2) Commonality.

6. The second requirement, set forth in Rule 23(a)(2), is commonality. As written by Professor Newberg, a legal scholar frequently cited by the Arkansas Supreme Court in class action opinions,

> Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation

> be common. The test or standard for meeting the rule 23(a)(2) prerequisite is . . . that is there need be only a single issue common to all members of the class. . . When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.

Herbert B. Newberg, *Newberg on Class Actions*, § 3.10 (3d ed. 1993); *BPS, Inc. v. Richardson*, 341 Ark. 34, 20 S.W.3d 403, 407 (2000.

7. These common issues of law and fact asserted to exist by Mr. Bryant arise principally from Mr. Bryant's allegation that the class vehicles contain defectively designed PBR 210x30 Drum-in-Hat parking brake systems, and that GM engaged in a cover up to avoid paying warranty claims. Among others, Mr. Bryant believes the common issues of law and fact satisfying Rule 23(a)(2) in this matter are:

> **BREACH OF EXPRESS WARRANTY:** Whether, based on the terms of GM's written limited warranty, the alleged design flaw in the parking brakes in class vehicles constitutes a "vehicle defect related to materials or workmanship occurring during the Warranty Period."

Appendix B

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY: Whether the alleged design flaw in the parking brakes on class vehicles has rendered those vehicles "not fit for [their] ordinary purpose."

MAGNUSON-MOSS WARRANTY ACT: Whether GM, by virtue of the parking brake's allegedly defective design, has failed to comply with its own "written warranty" or an "implied warranty."

UNJUST ENRICHMENT: Whether GM, by allegedly defectively designing the parking brake and concealing the defect to avoid paying warranty claims, has unjustly retained benefits that it should restore to Plaintiff and class members.

FRAUDULENT CONCEALMENT: Whether GM, once it acquired knowledge of the parking brake's defect in late 2000 (or sometime later), was clothed with a duty to speak to existing owners of class vehicles so they could obtain warranty relief. In addition, whether GM, once it acquired knowledge of the parking brake's defect in late 2000 (or some time later), owed a duty to speak to prospective purchasers of class vehicles, alerting them to the existence of the defect.

> **DAMAGES:** Whether Mr. Bryant and the class members have suffered and are entitled to damages.
>
> **RESTITUTION:** Whether Mr. Bryant and class members are entitled to restitution based on, without limitation, GM's unjust-enrichment-related misconduct and/or having previously paid for repairs to the defective parking brakes.

8. In view of its factual findings regarding the alleged defective parking brake and GM's alleged cover up, and Mr. Bryant's pleadings, the Court agrees with Mr. Bryant and concludes the foregoing issues of law and fact are sufficiently common to establish Rule 23(a)(2)'s element of commonality.

D. Rule 23(a)(3) Typicality.

9. The Arkansas Supreme Court has also cited Professor Newberg's work in defining the contours of typicality required by Rule 23(a)(3):

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiffs injury arises from or is directly related to a wrong to a class, and that

> wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims. [Footnotes omitted.]

Summons v. Missouri Pac. R.R., 306 Ark. 116, 813 S.W.2d 240, 243 (1991) (citing H. Newberg, *Class Actions*, § 3.13 (2d ed. 1985)); *Cheqnet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956, 959 (1995); *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898, 904 (1997). When analyzing typicality, the focus should be "upon the defendant's conduct and not the injuries or damages suffered by the plaintiffs." *Jacola*, *954* S.W.2d at 904. Similarly, "even if allegations about injuries or damages are different, claims are typical when they 'arise from the same wrong allegedly committed against the class.'" *Farm Bureau Mutual Ins. Co. of Ark., Inc. v. Lee*, 323 Ark. 706, 918 S.W.2d 129, 131 (1996) (citing *Cheqnet Systems, Inc.*, 911 S.W.2d at 959); *THE/FRE, Inc. v. Martin*, 349 Ark. 507, 78 S.W.3d 723, 729 (2002) ("Our case law is clear that the essence of the typicality requirement is the conduct of

the defendants and not the varying fact patterns and degree of injury or damage to individual class members").

10. With regard to defenses GM may raise, the Arkansas Supreme Court has repeatedly refused to examine such defenses at the certification stage, especially in the course of evaluating typicality. *See Lee*, 918 S.W.2d at 130 (Characterizing as "false" appellee's premise that a plaintiff "'individually must have a claim before he can seek certification of a class.'"); *Jacola*, 954 S.W.2d at 905 (explicit refusal to consider merits-based argument that Jacolas were inadequate representatives because they did not read their insurance policy); *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.2d 838, 841 (2000) (accusing defendant of "plowing old ground" in arguing potential defenses against the putative class representatives should be examined in the course of, among other things, addressing typicality); *Direct General Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528, 531 (1997) ("Moreover, it is apparent that Direct Insurance, by asserting that Ms. Lane has not suffered any damages, has attempted to defeat class certification by delving into the merits of the case. That is inappropriate."); *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 76 S.W.3d 243, 248 (2002) ("Moreover, this court has repeatedly held that we will not look either to the merits of the class claims or to the appellant's defenses in determining the procedural issue of whether the Rule 23 factors are satisfied.").

11. The Court is satisfied a sufficient relationship exists between the alleged injury to Mr. Bryant and GM's alleged conduct affecting the class to satisfy the requirement of typicality. Mr. Bryant purchased and currently owns a class vehicle. He has also received GM's written limited warranty with his purchase. Mr. Bryant has suffered the alleged parking brake problem this litigation concerns. The wrong allegedly committed against the class — GM designing and implementing a defectively designed parking brake into class vehicles, then engaging in a cover up — is the precise wrong Mr. Bryant contends he has suffered, especially because he purchased his vehicle in April 2002, which is after October 21, 2001 but before the issuance of GM's January 28, 2003 service bulletin. Finally, because the damages sought in this matter appear to be essentially uniform, there is no concern Mr. Bryant's damages are any different from or at odds with those of other class members (which is not a concern the Arkansas Supreme Court would entertain anyway). In fact, the apparent uniformity of damages here does nothing but strengthen the case for typicality and for fulfillment of the other Rule 23 requirements.

12. GM contends Mr. Bryant is subject to "unique defenses" that defeat typicality because he didn't give pre-suit notice to GM, and he didn't maintain his vehicle according to his owner's manual. The Court disagrees. First, if the notice issue has any significance whatsoever (the Court believes it does not, *see* footnote 16, *infra*), it only affects the warranty claims asserted by Mr. Bryant and class members. Mr. Bryant has asserted

claims other than for breach of warranty. Lack of notice will not be a defense, let alone a "unique defense" to those claims. Second, Mr. Bryant's assertion of parking brake "failure", with which the Court agrees, negates GM's lack-of-maintenance argument. Not even daily maintenance could cure the alleged parking brake defect and the "failure" it allegedly produces. Third, and finally, even assuming Mr. Bryant is subject to GM's lack of notice and failure-to-maintain defenses, then a population of class members will almost certainly be as well. If class representatives and class members have potential exposure to the same defenses, such defenses are not sufficiently "unique" to defeat typicality. *Barnes*, 349 Ark. at 529, 78 S.W. 3d at 736; *USA Check Cashers of Little Rock, Inc.*, 349 Ark. at 81; 76 S.W.3d at 248. GM's lack of typicality argument based on these factors is rejected. The Court concludes Mr. Bryant has established Rule 23(a)(3) typicality.

E. Rule 23(a)(4) Adequacy of Representation.

13. Rule 23(a)(4)'s requirement of adequacy of representation was first addressed in the Arkansas Supreme Court's decision in *First National Bank of Fort Smith* as follows:

> The elements of the requirement are: (1) the representative counsel must be qualified experienced and generally able to conduct the litigation; (2) that there be no evidence of collusion or conflicting interest between the representative and the class; and (3) the

> representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.

First National Bank of Fort Smith v. Mercantile Bank, 304 Ark. 196, 801 S.W.2d 38, 40-41 (1990) (citing *Gentry v. C&D Oil Co.*, 102 F.R.D. 490, 493 (W.D. Ark. 1984)).

14. As for the first element, absent a showing to the contrary, it is presumed that the representative's attorney will vigorously and competently pursue the litigation. *BPS, Inc.*, 20 S.W.3d at 408 (citing *Jacola*, 954 S.W.2d at 904). Mr. Bryant's counsel has entered their firm resumes into evidence detailing their various backgrounds and experiences handling complex civil litigation, including class actions. Representative counsel have also vigorously pursued this litigation, diligently conducting voluminous discovery, hiring expert witnesses, seeking class certification, and preparing for trial on the merits. This first element is established.

15. With regard to the second element, there is no evidence that collusion or conflicting interests exist between Mr. Bryant and the class. That element is easily satisfied.

16. Third, and finally, Mr. Bryant owns a class vehicle, alleges he has been harmed by GM's misconduct affecting all class members, and has educated himself

concerning GM's alleged practices bringing about that harm. He is very much interested in obtaining relief for himself and class members both in Arkansas and throughout the United States. He is not at all reluctant to assist with written discovery requests, participate in oral discovery, and generally assist representative counsel with the decisions that need to be made during the course of this litigation.

17. All in all, Mr. Bryant has satisfied the Court that he is an adequate class representative. The Rule 23(a)(4) element of adequacy is met.

F. Rule 23(b) Predominance.

18. Mr. Bryant, as noted, has established the existence of common issues of law and fact as required by Rule 23(a)(2). *BPS, Inc.*, 20 S.W.3d at 408 ("We have held that the starting point for our examination of the predominance issue is whether a common issue of law or fact exists in the case for all class members."); *Lenders Title Co. v. Chandler*, No. 04-41, 2004 Ark. LEXIS 399 *15 (Ark. June 17, 2004) ("Lender's II"). Accordingly,

> the next issue is whether the common question predominates over individual questions. When deciding whether common questions predominate over other questions affecting only individual members, [the Arkansas Supreme Court] does not merely compare the number of individual versus common claims.

> *[BPS, Inc.*, 20 S.W.3d at 408] Rather, [it] decides if the issues common to all class members "predominate over" the individual issues, which can be resolved during the decertified stage of a bifurcated proceeding. *Id.* Thus, the mere fact that individual issues and defenses may be raised regarding the recovery of individual members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members. *USA Check Cashers*, 349 Ark. 71, 76 S.W.3d 243.

Id. It is the element of Rule 23(b) predominance that GM contends is most lacking in this case. The Court will address GM's contentions in turn.

i. Individual Inspections and Use Factors.

20. GM principally argues predominance is lacking because each class member's vehicle must be inspected in order to determine whether a parking brake "failure" has occurred, and because individual-use factors such as related component failure, rough road conditions, excessive dirt in the brake, owner modification, lack of service or maintenance, overloading, error by third-party service technician, or prior accident all may contribute to parking brake "failure". GM attempts to shore up these arguments by claiming parking brake "failure" can only be defined in ultimate, safety-related terms — that is, as the parking brake's linings

excessively wearing to the point of not being able to hold a vehicle on a hill or grade. GM also cites two Arkansas cases *Mittry* and *Baker* — as establishing a rule that "where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member" Rule 23(b) predominance cannot be found. *Mittry v. Bancorpsouth Bank*, No. 04-829, 2005 Ark. LEXIS 6 (Ark. Jan. 6, 2005); *Baker v. Wyeth-Aherst Labs Division*, 338 Ark. 242, 992 S.W.2d 797, 800 (1999).

21. The Court disagrees that Rule 23(b) predominance is lacking due either to a requirement of individual vehicle inspections, or the individual-use factors alleged by GM. Both Mr. Bryant's pleadings and the evidence adduced demonstrate the primary alleged "failure" in the parking brake is the allegedly defective high-force spring clip retainer not permitting the shoe and attached linings to adequately float inside the brake drum. The Court has seen nothing to convince it that this alleged defect is not present in all class vehicles, or that it doesn't occur or manifest itself each time a class vehicle is used. To the contrary, and as stressed by Mr. Bryant a the class certification hearing, the alleged inadequate float problem appears to be something that is present in all class vehicles and which occurs each time a class vehicle is used. This is because all class vehicles utilize the PBR 210x30 Drum-in-Hat park brake system, and GM has admitted in numerous documents, with little to no equivocation, that the inadequate float problem regarding that brake system is a real one.

22. As for *Mittry* and *Baker*, even if those cases stand for what GM says they stand for, the presence of this common inadequate float problem negates GM's argument that there is no one set of operative facts that establishes liability, or no single proximate cause that equally applies to each potential class member. For that reason, neither *Mittry* nor *Baker* gives the Court any pause whatsoever.[9]

23. Even assuming *arguendo* the parking brake "failure" should, as GM says, be defined more broadly such that individual inspections for lining wear and/or consideration of individual use factors might be necessary, Rule 23(h) predominance still exists. The Court views any need for individual inspections and/or the individual use factors merely as individual determinations relating to right to recovery or damages that pale in comparison to the common issues surrounding GM's alleged defectively designed parking brake and cover up to avoid paying warranty claims. In

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9. As discussed in paragraph 18 of the Court's findings of fact, GM has also admitted the design of the PBR 210x30 Drum-in-Hat parking brake system with the high force spring clip retainer is "...less than optimal because it is overly sensitive to proper lining-to-drum clearances." P. Exh, "2", GM000036107; P. Exh. "7"; P. Exh. "9", p. 11 of 13. In the Court's view, this is yet another potential defect in the parking brake system that existed from day one off the assembly line in all class vehicles, and which reveals itself each time class vehicles are driven, This alleged defect also defeats GM's argument that there is no common defect that uniformly harms Mr. Bryant and class members.

Seeco, the Arkansas Supreme Court discussed the significance of such individual, right-to-recover determinations as follows:

> Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.

Seeco, Inc. v. Hales, 330 Ark. 402, 954 S.W.2d 234, 238 (1997) *quoting* 1 Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 4.26, at 4-104 (3d ed. 1992).[10]

24. The predominance concerns arising from individual use factors or inspections are no different from the ones the Arkansas Supreme Court in recent years addressed and rejected in *Seeco* and other cases.[11]

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10. The identical excerpt from Professor Newberg's treatise is also cited for the same proposition in both *USA Check Cashers* and *Tay-Tay, Inc. in* support of the Arkansas Supreme Court's affirming the trial court's finding of predominance. *See USA Check Cashers of Little Rock, Inc.*, 76 S.W.3d at 249-250; *Tay-Tay, Inc. v. Young*, 349 Ark. 675, 80 S.W.3d 365, 372 (2002).

11. *See Jacola*, 954 S.W.2d at 903; *Seeco*, 954 S.W.2d at 238; *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423, 438 (1999); *BNL Equity*, 10 S.W.3d at 842-843; (Cont'd)

[1] Mr. Bryant relies on these cases in his briefing, and rightly so. GM has not convinced the Court these cases should not have direct bearing on the predominance analysis in this case.

25. In fact, it appears the Arkansas Supreme Court in *Snowden* addressed and rejected an argument nearly identical to GM's regarding the need for individual inspections as they pertain to wrecked cars.[12] The

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Arkansas Blue Cross and Blue Shield v. Hicks, 349 Ark. 269, 78 S.W.3d 58, 63 (2002); *Lenders II*, 2004 Ark. LEXIS 399 at **16-17; *American Abstract & Title Co. v. Rice*, No. 03-754, 2004 Ark. LEXIS 401 at **12-14 (July17, 2004); *Farmers Ins. Co., Inc. v. Snowden*, No. 05-527, 2006 Ark. LEXIS 298 at *19 (April 13, 2006).

12. In *Snowden* the plaintiff filed class action against defendant auto insurer claiming it had breached insurance contracts by refusing to pay, in addition to cost of repairs, diminished value of policyholders' automobiles that had endured collision damage. The trial court determined two predominating issues existed: 1) whether the Arkansas Personal Auto Policy in issue obligated the defendant to compensate insureds for diminished value; and 2) whether Plaintiff and class members had any obligations other than presenting their claim to Farmers to receive compensation for diminished value. In affirming the trial court's finding, the Court wrote

> In the instant case, the class is made up of insureds who all had the same policy with Farmers. The overarching issue is whether the policy owned by all the insureds bound Farmers to pay proper claims

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inspections of wrecked cars in *Snowden* were required to make an assessment of diminished value. The *Snowden* inspections, in the Court's view, are more individualized that anything that may be required in this case, as they required not only individual inspections, but individual, case-by-case damage calculations based on what was seen. By contrast, the Court understands Mr. Bryant to allege that new, non-defective low-force spring retaining clips are necessary for all class members. No individual inspections are required for

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> for diminished value, which is a question that does not rely on factors such as meeting of the minds or when the contract was created. It is a question on which this case turns and is a strict question of Arkansas law and contract interpretation.

Snowden, 2006 Ark. LEXIS 298 at *19. In addressing the insurer's complaint that the damages each aggrieved policyholder suffered would be vastly different and thus defeat predominance, the Court responded,

> As previously noted, the common questions in the instant case do not rely on individualized factors, rather they turn on Arkansas law and contract interpretation. The individualized factors, including the factors discussed by appellant's expert, are only relevant to the issue of damages, determining whether or not a certain insured has a valid claim for diminished value and is entitled to that compensation from Farmers.

Id. at **21-22.

class members to obtain that relief. GM's inspection concern arises only because Mr. Bryant's contends that if the alleged defect has cause excessive lining wear as per GM's service bulletin or recall criteria, then lining replacement is also necessary. But the inspection of brake linings can occur in conjunction with the clip replacement, requires only a few measurements, and is a task Mr. Bryant asserts must occur anyway, incidental to the clip replacement. Moreover, the cost of new parking brake linings appears to be certain or fixed, unlike the diminution-in-value damages assessment discussed in *Snowden*. In sum, because the Arkansas Supreme Court found no unconquerable predominance problems in *Snowden* on the basis of individual inspections, the Court will find none in this case.

ii. Potential Application of Multiple States' Laws.

26. GM also insists that the potential application of multiple states' laws to create predominance concerns. The Court disagrees.

27. First, beginning with *In re Prempro*, the cases GM cites for the proposition that application of multiple states' laws is necessary are all federal cases requiring a "rigorous analysis" of Fed. R. Civ. P. 23 class-certification factors, including the impact state-law variations has on predominance.[13] Importantly, the

13. *E.g. In re Prempro Prod. Liab. Litig.*, 230 F.R.D. 555, 565 (E.D. Ark. 2005) ("A class should not be certified until the district court has found through rigorous analysis, that all the (Cont'd)

Arkansas Supreme Court requires no such "rigorous analysis". *Lenders II*, 2004 Ark. LEXIS 399 at *7-8 ("As stated in *Lenders I*, [Ark. R. Civ. P. 23] does not require the trial court to conduct a rigorous analysis; rather, the trial court must undertake enough of an analysis to enable [the reviewing court] to conduct a meaningful review of the certification issue."); *Lender's Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003) ("Lender's I"); *Jacola*, 330 Ark. 261, 954 S.W.2d 901 ("We have not, as argued by the dissent, previously required the court to enter into the record a detailed explanation of why it concluded that certification was proper, and we refuse to impose such a requirement on the trial court at this time."). The Court prefers to follow Arkansas Supreme Court precedent in determining whether class certification is appropriate. GM's attempt to engraft a "rigorous analysis" requirement onto the elements of class certification under Ark. R. Civ. P. 23 is not well taken and is rejected.

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prerequisites of Rule 23(a) have been satisfied.") (internal quotes omitted); *Zinser v. Accuflex Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001) ("Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23."); *Spence v. Clock*, 227 F.3d 308, 313 (5th Cir. 2000) ("Before *Castano*, then-Judge Ginsburg wrote that class action plaintiffs must provide an 'extensive analysis' of state law variations to reveal whether these pose "insuperable obstacles" to certification."); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996) ("The Supreme Court has required district courts to conduct a rigorous analysis into whether the prerequisites of Rule 23 are met before certifying a class.")

28. Second, the Court agrees with Mr. Bryant that trial judges in Arkansas have wide discretion to certify class actions. It also agrees with Mr. Bryant that trial courts have wide discretion to manage class actions. *BNL Equity Corp.*, 10 S.W.3d at 838. *BNL Equity* was a securities class action which, by all accounts, would require complex and individual inquiries into the level of knowledge each class member possessed about a fraudulent investment. The appellants, similar to GM regarding application of multiple states' laws here, "rais[ed] the spectre that with the potential for individual suits splintering on issues like investor knowledge, trial of the class action could unravel and turn into a procedural nightmare." *Id.* at 844. The Arkansas Supreme Court, however, viewed appellants' concern as no deterrent to predominance or superiority, or to class certification in general:

> We will not speculate on this eventuality. We simply hold that at this stage there is a common issue related to the appellants' conduct and liability that predominates over individual questions and renders a class action the superior method for litigating the matter.

Id. The Court in *BNL Equity* then observed:

> This court has recognized that the ability to manage and guide a class action is a necessary part of a trial court's decision to certify. *See International Union of Elec., Radio & Mach. Workers v. Hudson, supra.* We further

have alluded to the substantial power in the trial court to manage a class action. *Id.; see also Summons v. Missouri Pac., R.R., supra.*

We have also noted the ability of the trial court to decertify should the action become too unwieldy. Rule 23 specifically contemplates that circumstance when it states: "An order under this section may be conditional and it may be altered or amended before the decision on the merits." Ark. R. Civ. P. 23(b). In the recent case of *Fraley v. Williams Ford Tractor & Equip. Co., supra*, we quoted from *Newberg On Class Actions* regarding the decertification option and the fact that this flexibility in the trial court is vital to "judicious use of the class device." *See I Newberg On Class Actions* § 7.47, at 146 (3d ed. 1992).

We have no hesitancy in placing the management of this class action in the trial court. That is what the rule contemplates, and, as already described, real efficiencies can be obtained by resolving common issues, both for the plaintiff class and the appellants. Were we, on the other hand, to speculate on class management or direct the trial court at this stage to present the parties with a management plan, we would be interfering in matters that clearly fall within the trial court's bailiwick.

Id. at 845. *BNL Equity's* message is that an important component of a trial court's discretion to certify class actions is its autonomy or "substantial powers" to manage them. Thus trial courts are not required to justify their certification decisions by, for example, rigorously analyzing the Rule 23 certification elements. *Lenders II, Lender's I, Jacola, supra.* Nor are they required to justify certification decisions by creating detailed "management plan[s]" addressing how a case may be managed and tried. *BNL Equity, supra.*

29. Importantly, the Arkansas Supreme Court alluded to trial court autonomy and "substantial [class management] powers" in addressing the precise issue GM now raises: application of multiple states' laws. *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991). *Graham* involved a potential class of 1,419 annuitants residing in thirty-nine (39) different states. The annuitants claimed Security Benefit remained liable for annuity obligations because it never provided notice another company, now insolvent, had assumed the obligations. Security Benefit argued, in part, the doctrine of novation might provide it a defense, and claimed ". . . . the law of thirty-nine states relative to novation would have to be explored and [] would splinter the class action into individual lawsuits," thus creating Rule 23(b) predominance concerns. *Id.* at 945. The Court rejected the defendant's argument:

> The mere fact that choice of law may be involved in the case of some claimants living in different states is not sufficient in and of

> itself to warrant a denial of class certification. *C.f., Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). And though we are not convinced at this stage that reference to the laws of thirty-nine states will be necessary, should it be required, this does not seem a particularly daunting or unmanageable task for the parties or for the trial court.

Id. at 946. In footnote 18 of its Brief In Opposition GM contends "*Security Benefit* does not help Plaintiff. In that matter, the court determined that 'Arkansas law is the law to be applied' under the contract at issue." GM's contention is wrong. The choice of law issue confronted by the Court in *Graham* concerned novation; it did not, as GM says, center on a contractual term. *Id.* In any event, the Court in *Graham* clearly saw potential application of many states' laws as not germane to class certification. It instead viewed choice of law as a task for the trial court to undertake later in the course of exercising its autonomy and "substantial powers" to manage the class action.

30. This leads the Court to its third reason why Arkansas law does not support GM's argument, especially GM's suggestion the Court must resolve the apparent choice of law dispute before class certification. Arkansas trial courts are not permitted to delve into the merits of a case in deciding whether to certify it as a class action. *BNL Equity, Fraley, supra.* In truth, there is no greater merits-intensive determination than the one regarding choice of law. Choice of law has everything

to do with a case's merits. In many cases it is not briefed, analyzed and determined until the litigation's later stages. So it would be premature for the Court, at this stage in the case, to make the call on choice of law.

31. Fourth, and finally, it is not as if a decision to certify this matter as a class without resolving the choice of law issue will create incurable problems. The Arkansas Supreme Court has repeatedly stated ". . . . a circuit court can always decertify a class should the action become too unwieldy." *THE/FRE, Inc.*, 78 S.W. 3d 723; *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 76 S.W.3d 243, 248 (2002); *The Money Place v. Barnes*, 349 Ark. 518, 78 S.W. 3d 730 (2002); *F&G Fin. Servs. v. Barnes*, 349 Ark. 675, 80 S.W. 3d 365 (2002). If application of multiple states' laws is eventually required here, and it proves too cumbersome or problematic, the Court can consider decertifying the class. As noted in the Arkansas Supreme Court's *Fraley* decision:

> Rule 23 of the Arkansas Rules of Civil Procedure specifically states that "an order under this section may be conditional and it may be altered or amended before the decision on the merits." Ark. R. Civ. P. 23; *See also* NEWBERG ON CLASS ACTIONS, § 7.47. Class rulings are often reconsidered, and subsequently affirmed, altered, modified, or withdrawn. *Id.*

> Although the court's initial decision under Rule 23(c)(1) that an action is maintainable on a class basis in fact may be the final resolution of the question, it is not irreversible and may be altered or amended at a later date. This power to change the class certification decision has encouraged many courts to be quite liberal in certifying a class when that decision is made at an early stage, noting that the action always can be decertified or the class description altered if later events suggest that it is appropriate to do so.
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> WRIGHT, MILLER & KANE: FEDERAL PRACTICE & PROCEDURE 2D § 1785 at pp. 128-31 (2d Ed. 1986) (citations omitted). "The ability of a court to reconsider its initial class rulings . . . is a vital ingredient in the flexibility of courts to realize the full potential benefits flowing from the judicious use of the class device." NEWBERG ON CLASS ACTIONS, § 7.47 at pp. 7-146. Class action certification is necessarily an ongoing process in light of Rule 23's opt-out and decertification provisions.

Fraley, 5 S.W.3d at 438-39 (1999). A trial court's ability to decertify class actions is an additional component of its wide discretion to manage class actions. These flexible

standards likely frustrate GM, particularly as to its assertion that application of multiple states' laws will create Rule 23(b) predominance problems and frustrate management of this case. However, Mr. Bryant filed this case in an Arkansas state court, not in federal court. GM is therefore bound by Ark. Civ. P. 23 and the Arkansas Supreme Court decisions interpreting it.

iii. GM's Issues With Mr. Bryant's Proposed Trial Plan.

32. Further contesting Rule 23(b) predominance and other Rule 23(b) elements, manageability in particular, GM contends Mr. Bryant's trial plan does not feasibly deal with potential state law variations, or supposed individual class member issues such as: notice of warranty breach; whether an individual's parking brake has been repaired under warranty; expiration of factory warranty based on mileage; individual knowledge of parking brake defect; fraud-related materiality and reliance; the entity to recover with regard to leased vehicles; application of statutes of limitation; comparative fault, if available; and the damages a given class member can recover. GM argues all these factors create incurable Rule 23(b) predominance, superiority and manageability concerns. The Court disagrees with GM.

33. As just discussed, now is not the time to decide whether the laws of multiple states will apply. Neither is Mr. Bryant required, at this juncture, to submit a detailed trial plan which the Court must analyze and

adopt, reject or modify in determining whether class certification is proper. Nevertheless, for the sake of addressing GM's criticism of Mr. Bryant, the Court, in the past, has examined many of the variations in state warranty, fraudulent concealment and unjust enrichment laws GM contends here to be insurmountable. While some legal variations may exist amongst different states, the Court does not perceive them to create any barrier to class certification. Second, in the event application and additional analysis of multiple states' laws yields a concern, it is important to note that Arkansas trial courts have multiple tools at their disposal to negotiate matters such as state-law variations, as well as the supposed individual issues GM complains of. Many of those tools, such as the option to decertify, have already been discussed. But perhaps the most useful tool, not yet discussed, is case bifurcation:

> This court has repeatedly recognized that conducting a trial on the common issue in a representative fashion can achieve judicial efficiency. *See Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991); *International Union of Elect., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988). Moreover, this court has routinely found the bifurcated process of class actions to be consistent with Rule 23(d), which allows the trial court to enter orders necessary for the appropriate management of the class action. *Mega Life*, 330 Ark. 261, 954 S.W.2d 898; *Hudson*, 295 Ark. 107, 747 S.W.2d 81. In

> fact, this court has expressed its approval for the bifurcated approach to the predominance element by allowing trial courts to divide the case into two phases: (1) certification for resolution of the preliminary, common issues; and (2) decertification for the resolution of the individual issues. *Mega Life*, 330 Ark. 261, 954 S.W.2d 898. The bifurcated approach has only been disallowed where the preliminary issues to be resolved were individual issues rather than common ones. *See Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

Arkansas Blue Cross & Blue Shield v. Hicks, 349 Ark. 269, 286, 78 S.W. 3d 58, 68 (2002). In this case, numerous common issues exist and are suitable to resolve in a "phase I" trial. The Court has previously described many of those issues, all centering on GM's alleged defective design and subsequent cover up to avoid paying warranty claims.

34. First, as Mr. Bryant discusses in his trial plan, given the identical wording in GM's written warranty to him and class members, GM's express-warranty liability can be litigated unconstrained by variations in state law warranty defect standards. In addition, despite what GM argues, the Uniform Commercial Code ("UCC") as adopted and applied by all states except Louisiana does provide uniform legal standards

governing the sales of goods.[14] In particular, it provides a nearly universal defect standard for implied warranties: whether the defect renders the good in issue "fit for its ordinary purpose."[15] The issue of whether the parking

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14. *See e.g. Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998) ("1n this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws.'"); *Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1180 (Ala. 2000)("The principles of the Uniform Commercial Code ("U.C.C.") can be easily applied on a classwide basis. Under U.C.C. Article 2, some version of which has been adopted in all states except Louisiana, a description of a product on a label creates an express warranty."); *Tesauro v. Quigley Corp.*, No. 1011, Control 051340, 2002 WL 372947 at * 5-6, 9 (Pa. Corn. Pl. Jan. 25, 2002) (certifying nationwide class of consumers who purchased "Cold-Eze" under implied warranty and unjust enrichment theories); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 957 (E.D. Tex. 2000) (recognizing the law under the UCC is uniform and that "[f]or decades, courts have certified [national] product defect class actions.").

15. As noted by one group of legal scholars:

> A multistate class action based on breach of implied warranty of merchantability need not be further subclassed because after the exclusion of relatively few states that still require vertical privity for economic loss claims (and also excluding used goods

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brake defect meets or falls short of that standard is perfectly suitable for a "phase I" trial. Warranty causation can also be addressed during "phase I", especially given Mr. Bryant's contention, with which the Court agrees, that the parking brake "failure" at issue is the inadequate lining float. Because inadequate lining float is alleged to occur in each GM vehicle owned by class members, the causation question should be a universal, class-wide one. Finally, during "phase II" individual warranty-related concerns, if any, can be litigated. These include, without limitation, whether an individual class member has provided notice[16]; when, if

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> and business purchasers in a few other states), state implied warranty law under UCC §2-314(2)(c) (whether the product is "fit for the ordinary purposes") is uniform as incorporated by Magnuson-Moss (15 U.S.C. §2301(7), both in terms of statutory language and judicial interpretation.

Brantley, Logan, and Moore, *Class Action Reports*, "Commonality of Applicable State Law In Nationwide or Multistate Class Actions — Breach of Implied Warranty", I. Introduction, p. 2 of 58 (2000).

16. However, because GM had actual notice of the parking brake issue in late 2000, well before Mr. Bryant and many class members purchased their vehicles, the Court does not agree with GM's contention that individual notice under UCC §2-607 is a required showing in this case, especially now that Mr. Bryant has given additional notice by filing suit. *E.g. Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo. 1980)("When, as here, the

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at all, a class member's warranty expired due to mileage; the type of ownership a given class member possesses (e.g.. purchase v. lease); and limitations-related issues. Warranty damages — which the Court believes will be essentially uniform — can also be addressed during a "phase II" trial.

35. Next, as to Mr. Bryant's fraudulent concealment claim, during "phase I" Mr. Bryant can present evidence not only of GM's defective design, but also concerning GM's alleged later cover up to avoid paying warranty claims. Mr. Bryant may then submit jury interrogatories[17], appropriately accounting for state-law

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purposes of the notice requirement have been fully served by actual notice, the notice provision should not operate as a technical procedural barrier to deny claimants the opportunity to litigate the case on the merits."); *City of Wichita v. U.S. Gypsum Co.*, 828 F. Supp. 851, 857 (D. Kan. 1993)("For example, "'[a] comparably strict application of the notice requirement . . . may not be appropriate in a case involving a consumer's claim of breach.') *rev'd on other grounds*, 72 F.3d 491 (10th Cir. 1996); *Shooshanian v. Wagner*, 672 P.2d 455, 462 (Alaska 1983)("We . . . are of the opinion that a complaint filed by a retail consumer within a reasonable period after goods are accepted satisfies the statutory notice requirement.").

17. "We have consistently held that the question of submitting special interrogatories to a jury is within the sound discretion of the trial court." *Shearer v. Morgan*, 240 Ark. 616, 623, 401 S.W.2d 21, 23 (1966) (citing *Missouri Pacific Transportation Co. v. Parker*, 200 Ark. 620, 140 S. W. 2d 997 (1940)).

variations, if any, concerning non-individualized elements of fraudulent concealment, *ie.* GM's knowledge of the defect and its *scienter (ie.* whether its withholding of knowledge was done with the fraudulent purpose to induce class members to buy defective vehicles or avoid paying warranty claims). The more individualized issues of whether GM owed a given class member a duty to disclose or whether a particular class member relied on GM's failure to disclose can be reserved for a "phase II" trial. The issue of damages can also be reserved for "phase II".

36. Finally, Mr. Bryant envisions trying nearly all elements of unjust enrichment in "phase I". The Court, at this point, cannot say this would be an altogether impossible task. During such a trial Mr. Bryant may present evidence not only of GM's alleged defective design, but also of its alleged cover up. Mr. Bryant may then submit jury interrogatories, appropriately accounting for state-law variations, if any, concerning the basic liability issue of whether GM was unjustly enriched by its alleged conduct. Mr. Bryant also believes that during "phase I" it can ask the jury, for purposes of disgorgement, to calculate the sum of money GM wrongfully retained. The jury in "phase I" may also make individual fault determinations regarding class members residing in states, if any, which recognize comparative fault or the like as a defense to unjust enrichment. Finally, the equitable division of the disgorged sum amongst deserving class members can be reserved for a "phase II" trial.

37. GM attacks Mr. Bryant's bifurcated trial plan as unconstitutional under *Castano and* similar cases. *See Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). GM cites Castano for the Seventh Amendment "mandate" that "parties [] have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Castano*, 84 F.3d at 750. The Court agrees *Castano* provides authority for this general rule. *See also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert denied*, 133 L.Ed. 2d 122, 116 S.Ct. 184 (1995) ("The right to a jury trial .... is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and no reexamined by another finder of fact.") But the court in *Castano* also noted bifurcated trials are permissible when ".... [the] issues are so separable that the second jury will not be called upon to reconsider findings of fact by the first[.]" *Id.* GM is not in a position argue Mr. Bryant's trial plan in this case is unconstitutional. The reason is obvious: the final trial plan, if one is even required, has not been developed by the Court. The issue is simply not ripe for determination. Still, the trial plan Mr. Bryant has described, in the Court's view, creates no constitutional concerns at all. Mr. Bryant contemplates trying fundamental or core liability issues in "phase I", leaving "phase II" for the individualized issues such as GM's affirmative defenses, reliance and the like. In some cases damages may also be tried in "phase II." The issues tried in each phase will be sufficiently separable; there will be no risk the jury in "phase II" will reconsider findings by the "phase I" jury. The Court is confident it

can, as Judge Posner described *in Rhone-Poulenc*, "carve at the joint" in such a way that the same issues are not reexamined by different juries.

38. In sum, Mr. Bryant's trial plan, while not necessary at this stage, is appropriate and adequately accounts for potential application of multiple states' laws. GM's arguments to the contrary are rejected. The Court concludes Mr. Bryant has established Rule 23(b) predominance.

G. Rule 23(b) Superiority.

39. Rule 23(b) requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. Ark. R. Civ. P. 23(b); *see USA Check Gushers*, 349 Ark. at 71, 76 S.W.3d at 243. The superiority requirement is satisfied if class certification is the more efficient way of handling the case, and it is fair to both sides. *Id.* The Arkansas Supreme Court has held that where a cohesive and manageable class exists, "real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary." *BPS, Inc.*, 20 S.W.3d at 410; *Lender's II*, 2004 Ark. LEXIS at *18. The Court, for several reasons, concludes Mr. Bryant has satisfied the Rule 23(b) requirement of superiority.

40. First, the Arkansas Supreme Court affirmed the trial court's finding of superiority in *Jacola, Seeco, Fraley, BNL Equity, Hicks, Lenders II, American*

Abstract & Title Co., and *Snowden* cases cited in footnote 11, *supra.* This speaks volumes to the wide discretion trial judges possess in deciding class certification issues, managing class trials, to superiority being found even where numerous individualized issues exist, and to the fact real efficiency can be gained by disposing of basic liability questions on a class-wide basis. *See Cheqnet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956, 960 (1995) ("The question of predominance of common questions *and of superiority* are 'very much related to the broad discretion conferred on a trial court faced with them.'") (Citation omitted) (Emphasis added). In its first modern-era class action opinion, *Hudson*, the Arkansas Supreme Court addressed all of these concepts thusly:

> By limiting the issue to be tried in a representative fashion to the one that is common to all, the trial court can achieve real efficiency. The common question here is whether the unions can be held liable for the actions of their members during the strike. If that question is answered in the negative, then the case is over except for the claims against the named individual defendants which could not be certified as a class action. If the question is answered affirmatively, then the trial court will surely have "splintered" cases to try with respect to the damages asserted by each member of each of the subclasses, but efficiency will still be achieved, as none of the plaintiffs would have to prove the unions' basic liability.

Is that unfair? It is not unfair to the unions, as they will be able to defend fully on the basic liability claim, and they will have the opportunity to present individual defenses to the claims of individual class members if their liability has been established in the first phase of the trial. They lose nothing. Would it be fair to the class members to require them to sue individually? The evidence so far shows that each putative class member has a claim that is too small to permit pursuing it economically. If they cannot sue as a class, the chances are they will not sue at all. We agree with the unions' argument that the sole fact that the claims are small is not a reason to permit a class action, but it is a consideration which has appeared when other courts, as we must do, have considered whether the class action is superior to other forms of relief. *See* C. Wright, A. Miller, and M. Kane, *supra*, § 1779, n. 21, citing *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), affirmed on other grounds, sub nom. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *Werfel v. Kramarsky*, 61 F.R.D. 674 (D.C.N.Y. 1974); and *Buchholtz v. Swift & Co.*, 62 F.R.D. 581 (D.C. Minn. 1973).

We recognize that the trial court has substantial power to manage a class action even though the directions given in our Rule 23 are not as extensive as those given in the comparable federal rule. This power to

> manage the action contributes to the discretion we find in the trial court to determine whether a class should be certified. We conclude there was no abuse in this case.

Intl Union of Electrical, Radio, and Machine Workers v. Hudson, 295 Ark. 107, 747 S.W.2d 81, 87 (1988).

41. Second, the uniform relief sought by Mr. Bryant and the class is relatively small if sought on an individual basis. Accordingly, it is not economically feasible for members of the class to pursue GM on an individual basis. The Arkansas Supreme Court has recognized real efficiencies and benefits inure to plaintiffs and class members in small-individual-damages cases. *Lenders II*, 2004 Ark. LEXIS 399 at *18 ("The smallness of the claims is a factor to be considered in deciding superiority; however, it may not be the sole basis for certifying a class.")[18]; *BNL Equity*, 10 S.W.3d at 844.

42. Third, the Arkansas Supreme Court has identified the possibility of multiple trials supplying inconsistent results and wasting judicial resources as a factor supporting rather than detracting from superiority. *Lenders II*, 2004 Ark. LEXIS 399 at *18 (". . . . we think it is apparent from the context that the

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18. The fact attorney fees may be recoverable as a component of one or more asserted causes of action does not, in general, affect the superiority analysis. *Lender's II*, 2004 Ark. LEXIS 399 at *20 ("However, we do not view the availability of attorney's fees, standing alone, as negating the trial court's analysis on superiority.").

inconsistent results envisioned by the trial court are those that would arise from the individual cases having to be tried in different courts, by different judges and juries. In this respect, the trial court's finding supports its conclusion on the criterion of superiority."); *BNL Equity*, 10 S.W.3d at 844 ("Furthermore, here the alternative to a class action would be numerous joinders, wholesale intervention, and several hundred small lawsuits which would be totally inefficient and wholly unmanageable. Surely, neither the parties nor the judicial system would benefit from a legion of lawsuits that are numerous, duplicative, and time consuming.").

43. Fourth, the Arkansas Supreme Court has expressed concern that absent certification of a class "numerous meritorious claims might go unaddressed." *BNL Equity*, 10 S.W.3d at 844 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L.Ed. 2d 628, 105 S.Ct. 2965 (1985). This principle is of unique importance here since, by GM's own admission, some population of owners of automatic-transmission class vehicles may not regularly use their parking brake and thus be aware of the defect. If nothing else, this class action will serve to alert class members that their parking brakes may be defective and need service. It would indeed be unfortunate for one or more class members to be deprived notice of the defect. Such deprivation could have harmful consequences.

44. Fifth, even GM may derive substantial benefit from class certification. In *BNL Equity*, the Court wrote,

> We also note that there is a real benefit to the appellants in a class action in that they have the opportunity to nip multiple claims in the bud with common defenses such as the investors' knowledge of the investment purchased, lack of the appellants' knowledge concerning the misrepresentations, and statute of limitations. We conclude that the superiority requirement has been met.

BNL Equity, 10 S.W.3d at 844. There is no reason to believe GM cannot potentially achieve some of the same benefits the defendant in BNL achieved, post-certification.

45. GM challenges Rule 23(b) superiority on manageability grounds. Apart from the potential application of multiple states' laws, which the Court has addressed, GM raises manageability concerns arising from the prospect of 4,000,000 individual trials having to be conducted in this matter.

46. First, the Court does not believe for one moment that 4,000,000 individual, phase II trials will be conducted in this case. Among other things, potential opt outs and claims dismissed under a summary disposition procedure that can be developed will greatly reduce the number of potential phase II trials.

47. Second, *Lenders II* concerned a class of 50,000 potential members and the Arkansas Supreme Court took no issue with it proceeding as a class action. *Lenders Title Co. v. Chandler*, No. 04-41, 2004 Ark. LEXIS 399 (Ark. June 17, 2004) ("Lender's II"). In the Court's view, the prospect of trying 50,000 cases is no different, from a manageability standpoint, than trying a potentially greater number of cases.

48. Third, the fact GM's allegedly defective design has adversely affected so many consumers is not Mr. Bryant's fault. Mr. Bryant and the class should not be penalized for the widespread nature of GM's alleged defect and subsequent cover up. *See Carnegie v. Household Intl, Inc.*, 376 F.3d 656, 660-661 (7th Cir. 2004) ("But although the district judge might have said more about manageability, the defendants have said nothing against it except that there are millions of class members. That is no argument at all. The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $ 30.").

49. Finally, in at least in the context of discussing class definition, the Arkansas Supreme Court has rejected lack of administrative feasibility as an excuse to avoid class certification. *Lenders II*, 2004 Ark. LEXIS 399 at *11-12) ("We are not persuaded by the argument that it is not administratively feasible for Lenders to have to manually review each of the more than 50,000 closing files to identify the class members. Instead, we

agree with Chandler that Lenders should not be allowed to defeat class certification by relying on its inadequate filing and record system."). The Court believes the Arkansas Supreme Court would similarly reject GM's similar argument that class size, alone, counsels against a finding of Rule 23(b) predominance.

50. GM also argues the NHTSA recall process is superior to Mr. Bryant's proposed class action. However, none of the cases GM's cites hold the availability of a NHTSA recall remedy *ipso facto* negates superiority. *See Amalgamated Workers Union v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3rd Cir. 1973) ("As we view it, it would appear [Federal Rule 23(b)(3)'s superiority component] was not intended to weigh the superiority of a class action against possible administrative relief."). Rather, the courts in each of these cases determined the class wasn't certifiable for other reasons, then mentioned — in dicta — that the class members could still petition NHTSA.

51. Here, there are multiple reasons why a class action is a superior method to resolve the claims of Mr. Bryant and the class. Moreover, as brought to light at the class certification hearing, the record reveals frustrated consumers have at least twice (most recently in mid 2006) petitioned NHTSA about the alleged parking brake defect in automatic transmission vehicles, and NHTSA rejected the petitions. Accordingly, the Court does not understand why GM believes NHTSA will provide a superior remedy to Mr. Bryant and class members. The Court concludes GM's NHTSA-based

superiority argument has no merit. Mr. Bryant has established Rule 23(b) superiority.

H. The *Wallis* Matter.

52. The Court also takes note of GM's assertion in its briefing that Mr. Bryant's claims concerning the allegedly defective parking brake are not cognizable because they, at most, assert a "no injury" case against GM barred under the Arkansas Supreme Court's *Wallis* case. *Wallis v. Ford Motor Company*, No. 04-506, 2005 Ark. LEXIS 301 (May 12, 2005). The Court, however, is unwilling to rule on that assertion at this time for two reasons.

53. First, the proper mechanism by which to raise such an assertion is either a motion to dismiss or motion for summary judgment. GM previously filed a motion to dismiss based on *Wallis*, among other things. But that motion is now moot, given the fact Mr. Bryant amended his pleadings before the class certification hearing.

54. Second, the determination of whether class certification is appropriate is essentially procedural in nature. *BNL Equity Corp.*, 340 Ark. at 356-57, 10 S.W.3d at 841. Accordingly, neither the trial court nor an appellate court may delve into the merits of the underlying claim when deciding whether the requirements of Rule 23 have been met. *Id.*; *Fraley*, 339 Ark. at 335, 5 S.W.3d at 431. The Court views the *Wallis* "no injury" issue to be inherently merits oriented and thus irrelevant to the class certification motion at hand.

Appendix B

IV.

Conclusion and Order

On the basis of the foregoing findings of fact and conclusions of law establishing Mr. Bryant has satisfied all class-certification elements in Ark. R. Civ. P. 23, the Court hereby GRANTS IN ALL THINGS Mr. Bryant's motion for class certification and ORDERS that the nationwide class of individuals described above (in paragraph III. A. 2.) is certified as a class for purposes of litigating this matter under Ark. R. Civ. P. 23. Mr. Bryant is appointed as class representative of the certified class and shall adhere to all duties such an appointment entails. In addition, the law firms of Patton, Roberts, McWilliams, & Capshaw, L.L.P. (James C. Wyly and Sean F. Rommel) and Bailey/Crowe & Kugler, L.L.P. (David Crowe and John Arnold) are appointed representative counsel to represent Mr. Bryant and the class in prosecuting this matter to final judgment. The Court, by separate order, will at some time in the near future issue a briefing schedule regarding the manner in which notice of class certification is to be given under Ark. R. Civ. P. 23(c) and/or (d).

Finally, the evidence the Court had before it in ruling on the issue of class certification was evaluated only in the context of considering the elements of Mr. Bryant's underlying claims in order to determine, for example, whether questions arising from those claims are common to the class and whether they will resolve the issue. *E.g. Williamson v. Sanofi Winthrop*

Pharmaceuticals, Inc., 347 Ark. 89, 98, 60 S.W.3d 428, 432 (2001). The Court has fully complied with the general rule that trial courts are not to delve into the merits of the underlying claims in determining whether class certification is appropriate. *BNL Equity*, *Fraley*, *supra*. In ordering that class certification is appropriate in this case, the Court has not, in any way, made findings of fact or conclusions of law regarding the merits of the claims or causes of action Mr. Bryant has asserted in his pleadings.

IT IS SO ORDERED this 11th day of January, 2007.

s/ Jim Hudson
JIM HUDSON, PRESIDING JUDGE

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(3)

No. 08-349

Supreme Court, U.S.
FILED
NOV 20 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,
Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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November 20, 2008

QUESTIONS PRESENTED

The Arkansas Supreme Court applied Arkansas's class-action jurisprudence to the issues raised in this interlocutory appeal to determine that, pursuant to Arkansas Rule of Civil Procedure 23, a choice-of-law analysis is not required pre-certification. Rather, the Arkansas Supreme Court determined that the choice-of-law analysis should be conducted subsequent to the initial class-certification stage of the litigation. The Questions Presented are:

1. Whether this Court has jurisdiction over a federal law question in a state interlocutory appeal that was not passed on by the state supreme court.

2. Whether the Federal Constitution overrides the Arkansas Supreme Court's class-action jurisprudence that is based on an Arkansas rule of procedure.

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INTRODUCTION

This case arises from an interlocutory appeal in a state court action involving a state supreme court's construction of a state procedural rule. General Motors ("GM") asked the Arkansas Supreme Court below to abandon its more than two decades of class-action jurisprudence to adopt the analysis applied by federal courts under Federal Rule of Civil Procedure 23. The Arkansas Supreme Court rejected GM's approach and, instead, applied its precedent derived from Arkansas Rule of Civil Procedure 23 to hold that Arkansas's class-action rule requires a choice-of-law analysis post-certification.

In construing Arkansas Rule 23, the Arkansas Supreme Court did not pass on a federal question. Rather, that court recognized that, once a final order is entered in this case, GM could challenge the circuit court's choice of law just as in any other case. The absence of any substantive choice-of-law determination by the court below should preclude a review of GM's substantive arguments raised in its petition. There is therefore no basis for this Court's review at this juncture of the case.

This Court's precedent provides that a particular state law may be applied to a nationwide class when that state has "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). As GM concedes, this Court has not interpreted the Federal Constitution to mandate the timing of the choice-of-law analysis. *See* Pet. 18. Rather, this Court has held only that the Federal Constitution requires that

the choice-of-law analysis be conducted in a constitutional manner that is not arbitrary or fundamentally unfair. Because there has been no choice-of-law in this case, there is no basis for thinking that the Arkansas Supreme Court will apply any state law in a manner inconsistent with this Court's precedent.

For these reasons, which are discussed more fully below, this Court should deny GM's petition for writ of certiorari.

STATEMENT OF THE CASE

1. Factual Background

Relying primarily on admissions from GM's own documents, Plaintiff Boyd Bryant, a resident of Arkansas, brought this class action against GM in February 2005. Mr. Bryant, who owns a class vehicle, complains that the parking brakes on approximately four million model-year 1999 through 2002 GM pickup trucks and sport utility vehicles are defectively designed and that GM devised a cover up to avoid paying to remedy this defect. Mr. Bryant asserted that the parking brakes in all class vehicles contained a defect at the time of purchase, which immediately obligated GM to provide warranty remedies.

The class vehicles in this case include the 3,905,481 model-year 1999-2002, 1500 Series pickups and utilities vehicles equipped with automatic transmissions and with PBR 210x30 Drum-in-Hat parking systems that contain high-force spring clip retainers. Those vehicles contain defective parking brakes whose linings, by GM's own admission, do not adequately float inside the parking brake drum. This inadequate "float" problem, in turn, can cause

the parking brake to "self energize" and experience lining wear-out after only 2,500 to 6,500 miles in use. The trial court also recognized another potential defect in the parking brake system based on GM's admission that the design of the PBR 210x30 Drum-in-Hat parking brake system is "less than optimal because it is overly sensitive to proper lining-to-drum clearances." Pet. App. 48a.

Although GM discovered the parking brake defect in late 2000, and in October 2001 actually redesigned the high-force spring clip to improve lining float in model-year 2003 and forward vehicles, it inexplicably delayed until September 17, 2002, to release a consumer repair solution (a reduced-force spring clip retainer kit) via a service bulletin to dealers. In the service bulletin, GM said: "Important – the spring clip kits mentioned in this bulletin do not address any parking brake concerns." That statement is evidence that GM did not want to pay for the spring clip kits under its warranty and that GM felt no obligation to tell its customers that it thought it might be responsible for the parking brake failures.

GM's delay until early 2003 permitted the expiration of the three-year warranty period on many 1999 through 2000 model-year class vehicles and permitted expiration of the 36,000 mileage limit on many class vehicles, regardless of model year. GM's delay saved the company millions of dollars, given the uniform nature of the inadequate lining float defect across all class vehicles, and the parking brake functionality problems the defect can produce, even during initial months of vehicle ownership and use.

Finally, consistent with its strategy of delay and pursuit of cost-savings, GM waited until April 2005, which, perhaps not coincidentally, was only two

months after this lawsuit was filed against GM, to conduct a limited recall of the defective parking brakes. That recall, two months after this lawsuit was filed, was suspiciously narrow in scope. It involved only 63,497 manual-transmission versions of the class vehicles while ignoring the 3,905,481 automatic-transmission versions of those vehicles.[1] To date, GM refuses to accept any responsibility for any problem in the class vehicles.

It is obvious that parking brakes are necessary in the class vehicles, despite GM's orchestrated spin that they are not. Not only does federal law require parking brakes, but the applicable GM owner's manuals are rife with warnings that parking brakes must be used to supplement the hill-holding capabilities of the vehicles' automatic transmission.[2]

GM's actions give rise to numerous causes of action in favor of the class, including: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; (4) common law unjust enrichment; (5) fraudulent concealment/ failure to disclose. Without limitation, these causes of action require a court and/or jury to address numerous factual and legal issues common both to Mr. Bryant and to all class members, as they all share the same common experiences.

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[1] Documents prepared by GM indicate that the cost to recall only vehicles with manual transmissions would be $6,645,793. The projected cost to recall both the manual and automatic transmission versions of the vehicles would have been 50 times greater, or $350,083,047.

[2] GM's own Vehicle Technical Specifications for the class vehicles specify, for example, that the parking brake *shall* hold the vehicle stationary at Gross Vehicle Weight with the transmission in neutral.

Mr. Bryant moved for class certification on July 14, 2006. Following a class-certification hearing, the trial court granted Mr. Bryant's motion for class certification in its January 11, 2007 order. Among other rulings, the trial court found that the common issues of law and fact predominated over any potential individual issues.[3] The trial court also determined that a choice-of-law analysis was not necessary pre-certification. GM subsequently appealed to the Arkansas Supreme Court.

2. Proceedings in the Court Below

From the trial court's order granting class certification, GM took an interlocutory appeal to the Arkansas Supreme Court pursuant to Rule of Appellate Procedure-Civil 2. That rule provides that the Arkansas Supreme Court has jurisdiction to review a trial court's order granting or denying class certification pursuant to Arkansas Rule 23. *See* Ark. R. App. P.-Civil 2(a)(9).

The Arkansas Supreme Court reviews the propriety of a class action as a procedural question and applies an abuse-of-discretion standard to determine whether the trial court's decision to certify a class

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[3] In its order, the trial court determined that the common issues predominated despite any individualized factors in part because "the alleged inadequate float problem appears to be something that is present in all class vehicles . . . because all class vehicles utilize" the same park brake system, and because GM "has admitted in numerous documents, with little or no equivocation, that the inadequate float problem regarding that brake system is a real one." Pet. App. 80a.

was an abuse of the trial court's discretion. *See, e.g.*, Pet. App. 5a.[4]

On appeal to the Arkansas Supreme Court, GM argued that the trial court erred by determining that, under Arkansas Rule 23, a choice-of-law analysis is not necessary prior to certification of a class. It was GM's contention that the predominance requirement of Rule 23 was not satisfied without the trial court first making a choice-of-law determination.

The Arkansas Supreme Court rejected GM's contention that Arkansas's class-action jurisprudence should require a choice-of-law analysis to be conducted prior to the certification of a class under Arkansas Rule 23.[5] Rather, that court relied on its previous holdings to determine that Arkansas's class-action jurisprudence does not require Arkansas trial courts to engage in a choice-of-law analysis prior to certifying a class.[6] The court added that "[it] has not

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[4] The Arkansas Supreme Court has consistently held that it reviews the propriety of a class action as a procedural question. *See, e.g.*, Pet. App. 6a. In reviewing a lower court's certification decision, it will not delve into the merits of the underlying claims to determine whether the procedural elements of Rule 23 have been satisfied. *Id.* at 6a. That court has said, "*a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.*" *Id.*

[5] The court below referred to the trial court's four reasons for postponing the choice-of-law analysis, all of which are based on Arkansas's class-action jurisprudence. *See* Pet. App. 7a-8a.

[6] In reaching its conclusion, the Arkansas Supreme Court relied on its prior holdings. *See Security Benefit Life Ins. Co. v. Graham*, 810 S.W.2d 943 (Ark. 1991) (holding that the laws of 39 states relative to a defense need not be explored pre-certification); *FirstPlus Home Loan Owner 1997-1 v. Bryant*, No. 07-740, 2008 WL 518226 (Ark. Feb. 28, 2008) (to be reported at --- S.W.3d ---) (affirming the holding in *Security Benefit* that "the mere fact that choice of law may be involved in the

hesitated to affirm a finding of predominance so long as a common issue to all class members predominated over individual issues." Pet. App. 14a. In this case, the court found that two common questions could be answered before determining any individual issues: (1) "[w]hether or not the class vehicles contain a defectively designed parking-brake system" and (2) "whether or not GM concealed that defect." *Id.* at 9a.

The Arkansas Supreme Court held that neither Arkansas's class-action jurisprudence nor the predominance requirement of Rule 23 requires a choice-of-law analysis to be conducted pre-certification. The Arkansas Supreme also discarded GM's claim that the "failure to require such an analysis precertification allows an analysis to evade review." *Id.* at 14a. That is because, the court determined, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." *Id.*

Because the Arkansas Supreme Court found that GM would have the opportunity to raise its challenge with respect to a choice-of-law determination in an appeal of the trial court's final order in this case, the Arkansas Supreme Court's decision determined only matters pertaining to an Arkansas rule of procedure and did not address or pass on any federal questions in its opinion.

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case of some parties living in different states is not sufficient in and of itself to warrant a denial of class certification").

REASONS FOR DENYING THE PETITION

I. AN INTERLOCUTORY APPEAL CONCERNING A STATE SUPREME COURT'S INTERPRETATION OF A STATE RULE OF CIVIL PROCEDURE IS NOT REVIEWABLE BY THIS COURT

A. The Arkansas Supreme Court Did Not Pass on a Federal Issue

1. This Court Requires that Claims Raised in a Petition for Writ of Certiorari Be Properly Presented to or Passed on by the State Supreme Court

In reviewing state court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim that was not addressed by, or properly presented to, the state court that rendered the decision the petitioner is asking this Court to review. *See Adams v. Robertson*, 520 U.S. 83, 88 (1997) (denying certiorari where the petitioners presented an issue that had not been passed on by the state supreme court).[7]

That rule, according to this Court, serves an important interest of comity because "it would be unseemly in our dual system of government to disturb the finality of state officials, and, equally important, proposed changes that could obviate any challenges to state action in federal court." *Id.* at 90. This Court also observed that "[r]equiring parties to raise issues below not only avoids unnecessary adjudication in

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[7] Under Section 1257(a), Congress has expressly limited this Court's review of state court decisions to only those final judgments or decrees entered by the highest courts of a state "where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution or laws of the United States."

this Court by allowing state courts to resolve issues on state-law grounds, but also assists [this Court] in [its] deliberation by promoting the creating of an adequate factual and legal record." *Id.* at 90-91.[8]

In *Adams*, a class-action settlement case, this Court observed that the Alabama Supreme Court had not expressly ruled on the question for which this Court granted certiorari—whether Alabama's rules governing class-action settlements satisfy the requirements of due process.[9] This Court emphasized its assumption that, when a state court is silent on a federal question, "the issue was not properly presented." *Id.* at 86. The party appealing to this Court thus bears the burden of overcoming this Court's assumption by demonstrating that the state court had "a fair opportunity to address the federal question that it sought to be presented here." *Id.* at 87 (internal quotations omitted).

Similar to GM here, the petitioners in *Adams* argued to this Court that Alabama's class-action rules violated the Due Process Clause of the United States Constitution. That issue, however, had not been properly raised or passed on by the Alabama

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[8] This Court also said the petitioner's proper presentation of their due process challenge to the state supreme court coupled with that court's decision to pass on that issue would have assisted this Court in understanding that state's rules "as a predicate to [its] assessment of their constitutional adequacy." *Adams*, 520 U.S. at 91.

[9] In deciding it had improvidently granted certiorari in *Adams*, this Court stated that, as a result of the respondents' failure to file a brief in opposition to the petition, they failed to satisfy their obligation to object to certiorari on the grounds that the petitioners' question presented had not been properly raised or addressed by the Alabama Supreme Court. 520 U.S. at 91.

Supreme Court. This Court, therefore, held that certiorari had been improvidently granted. *Id.* at 92.

In dismissing the petitioners' writ, the *Adams* Court observed that the petitioners failed to adequately present the constitutional issue to the Alabama Supreme Court. The petitioners merely mentioned their constitutional claim in the context of an argument that was entirely different from the one made to this Court. This Court pronounced that the mere "discussion of a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim." *Id.* at 88 (internal quotations omitted).

Not only did the petitioners in the *Adams* case fail properly to develop the constitutional issue in their opening brief, but in their reply brief to the state supreme court they also neglected to respond to the respondents' federal due process argument. *Id.* at 89. Instead, the focus of the petitioners' argument was based on the Alabama Constitution.

As the *Adams* petitioners did not meet their burden to prove that they had properly raised the constitutional issue to the state supreme court below, this Court found that, in the circumstances of that case, "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Id.* In reaching that conclusion, this Court recognized Alabama Supreme Court's "undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action settlements satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges." *Id.* at 90.

2. The Arkansas Supreme Court Did Not Pass on a Federal Question

Like the state court in *Adams*, the Arkansas Supreme Court here did not rule on an issue of constitutional import concerning Arkansas's rules of procedure governing class actions. Rather, the Arkansas Supreme Court's decision concerned only Arkansas Rule 23. In interpreting Arkansas Rule 23 as requiring a choice-of-law analysis post-certification, the Arkansas Supreme Court recognized that, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." Pet. App. 14a. Because the Arkansas Supreme Court did not pass on a constitutional issue in this interlocutory appeal, this Court should presume that petitioner failed properly to present the issue raised here to the Arkansas Supreme Court.

GM's arguments to the Arkansas Supreme Court confirm that presumption. In fact, GM cannot demonstrate that the Arkansas court had a fair opportunity to address the federal question for three reasons. First, as did the *Adams* petitioners, GM's opening brief below merely referred to a federal constitutional due process argument in the context of its main point that Arkansas Rule 23 should require a choice-of-law analysis pre-certification.[10]

Second, GM abandoned its frail federal constitutional claim in its reply brief. In fact, other than a cursory comment that due process requires consid-

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[10] In its brief below, GM articulated four challenges to the trial court's certification order. The federal constitutional component of GM's argument was merely an aside to one of those main points. In fact, GM dedicated only one paragraph and one sentence to a federal issue in its opening brief.

eration of choice-of-law issues pre-certification, GM made no mention of a federal claim. Like the petitioners in *Adams*, who in their reply brief to the Alabama Supreme Court focused only on the Alabama Constitution, GM focused only on an Arkansas rule of procedure in its attempt to convince the Arkansas court to modify that rule.

Third, not only did GM fail adequately to present a federal constitutional argument to the Arkansas Supreme Court in its briefs on appeal, but GM also failed to file a petition for rehearing to the Arkansas Supreme Court, thereby waiving its final opportunity to request that the Arkansas Supreme Court pass on a federal issue in the interlocutory appeal.[11] If GM was confident that it had raised a federal question that the Arkansas court neglected to decide, then GM could have filed a petition for rehearing to address the Court's decision not to pass on GM's undeveloped federal question.

As it did in *Adams*, this Court should find that GM failed to satisfy its burden to demonstrate that it properly raised the constitutional issue to the state supreme court below. Therefore, it was perfectly reasonable for the Arkansas Supreme Court to conclude that the broader federal claim was not before it. *See Adams*, 520 U.S. at 89. This Court's rationale in *Adams* is equally applicable here, as the Arkansas Supreme Court has an "undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing" class-action lawsuits filed in state court "satisfy the requirements of due process, and whether to exercise its power to

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[11] Arkansas Supreme Court Rule 2-3(g) allows parties to file a petition for rehearing in order "to call attention to specific errors of law or fact which the opinion is thought to contain."

amend those rules to avoid potential constitutional challenges." *Id.* at 90.

Having not had it presented squarely as a point for reversal, the Arkansas Supreme Court did not make a direct ruling on any federal constitutional argument in its opinion. Thus, GM has waived review of this issue by failing to address it to the Arkansas Supreme Court and by failing to obtain a ruling on its federal constitutional argument below.

B. There Has Been No Final Order in this Case, Which Arises from an Interlocutory Appeal

Congress has expressly limited this Court's review of state court decisions to only those *final* judgments or decrees entered by the highest courts of a state "where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution or laws of the United States." 28 U.S.C. § 1257(a).

GM's petition arises from an order by the Arkansas Supreme Court in an interlocutory appeal. There has been no final judgment with respect to any of the plaintiffs' claims or any of GM's defenses. Thus, the Arkansas Supreme Court's order interpreting Arkansas Rule 23 is not a final order reviewable by this Court in a certiorari petition. *See id.*[12]

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[12] Section 1257(a) provides that this Court may review final judgments rendered by state supreme courts where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Rather, the Arkansas Supreme Court, as the final authority on an Arkansas rule of civil procedure, interpreted Arkansas Rule 23 in a manner consistent with Arkansas's class-action jurisprudence. As no other state or federal court has the authority to preside over an Arkansas rule of civil procedure, the Arkansas Supreme Court's decision in this case does not conflict with the decision of any other jurisdiction. Furthermore, because the court below made no ruling with respect to a constitutional or federal question, the order entered by that court does not conflict with a ruling of this (or any other) Court.

C. There Is No Exception Permitting this Court's Review of the Non-Final Order

As the petition arises from an interlocutory appeal, this Court will consider granting certiorari only under narrow exceptions to its jurisdiction set out in Section 1257(a). *See* note 12, *supra*. Under those narrow exceptions, a state court's judgment must represent the final word within the state court system on a federal issue, and the failure of this Court immediately to review that issue must present a risk of seriously eroding federal policy. That exception is simply not supported by the facts here.

This Court has squarely ruled that a district court's grant or denial of a class-action certification is not appealable as a matter of right under 28 U.S.C. § 1291. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) (observing the rule that "a district court's order denying or granting class status is inherently tentative"). In *Coopers & Lybrand*, this Court considered the petitioners' request for this Court to review a district court's order decertifying a class. This Court observed that "[f]ederal appellate

jurisdiction generally depends on the existence of a decision by the [lower court] that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* at 467 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

In *Coopers & Lybrand*, this Court determined that neither the "collateral order" exception nor the "death knell" doctrine would apply to circumvent the final-judgment rule in a case where the lower court denied class certification. *Id.* at 476-77.

Concerning the collateral-order exception, this Court said that, in order to come within the small class of decisions excepted from the final-judgment rule, the lower court's order must have "conclusively determine[d] the disputed question, resolve[d] an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 468. Thus, an order denying class certification does not fit within this exception in part because such an order is subject to revision and it is subject to effective review after a final judgment. *Id.* at 469.

This Court also found that the death-knell doctrine did not apply to except an order denying class certification from the final-judgment rule. In so ruling, this Court considered that "even adherents of the 'death knell' doctrine acknowledge that a refusal to certify a class does not fall in the limited category of orders which, though nonfinal, may be appealed without undermining the policies served by the general rule." *Id.* at 471. According to this Court, "[i]t is undisputed that allowing an appeal from such an order in the ordinary case would run 'directly contrary to the policy of the final judgment rule embodied in 28 U.S.C. § 1291 and the sound reasons for it.'"

Id. (quoting *Korn v. Franchard Corp.*, 443 F.2d 1301, 1305 (2d Cir. 1971)).

The posture of this case is very similar to that presented to this Court in *Coopers & Lybrand*. Here, the class was certified by the trial court pursuant to Arkansas Rule 23. GM availed itself of a state court rule permitting an interlocutory appeal of the lower court's certification decision, and the certification order was thereby reviewed and affirmed by the Arkansas Supreme Court. Although *Coopers & Lybrand* arose from a federal court's decision, its track was somewhat parallel to the procedural posture here.

Just as in *Coopers & Lybrand*, there is no finality in this case to justify this Court's review, as there has been no final adjudication of the plaintiffs' claims or GM's defenses at this class-certification stage of the litigation.[13] Just as this Court explained in

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[13] In *Coopers & Lybrand*, this Court explained the important rationale behind its jurisdictional limitations by quoting from the unanimous decision by this Court in *Cobbledick v. United States*:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Coopers & Lybrand, 437 U.S. at 468 (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

Coopers & Lybrand, the order in this case clearly may be altered or amended prior to a decision on the merits, making it an "inherently tentative" order. 437 U.S. at 469 n.11. Absent a final order or any basis for excepting this case from the Court's final-judgment rule, this Court should deny GM's petition.

Furthermore, GM's arguments under this section concerning the trial plan in this case and the settlement pressure of certification do not justify any exception to the final-judgment rule.

GM's argument that the trial plan in this case is unworkable is specious, at best. *See* Pet. 10. Not only was an issue regarding the trial plan not raised to the Arkansas Supreme Court, but such an issue would not have been proper for that court's review in an interlocutory appeal under Arkansas Rule of Appellate Procedure-Civil 2. GM should first raise its concerns about the trial plan to the trial court. Only after a final order is entered by the trial court will such an issue be proper for an appeal. *See Coopers v. Lybrand*, 437 U.S. at 470 (explaining that the special rules governing class actions do not contain any unique provisions governing appeals, as "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation").

GM's notion that the certification of the class in this case creates tremendous settlement pressure should have no bearing on whether this Court exercises jurisdiction over this case. Furthermore, its assertion is not support for this Court to find that any of the narrow exceptions to the final-judgment rule should apply. GM's contention is essentially a request for this Court to expand the Federal Constitution based on an allegation of "settlement pres-

sure." Pet. 11. In order to obtain a final order that will be reviewable by the appellate courts, as did the defendant in *Shutts*, GM must also choose to refrain from settling with plaintiffs. GM's decision concerning whether to settle with plaintiffs at any stage in this litigation, however, is surely not reason enough to alter the United States Constitution or this Court's final-judgment rule.

II. THE ARKANSAS SUPREME COURT'S INTERPRETATION OF RULE 23 OF THE ARKANSAS RULES OF CIVIL PROCEDURE IN THIS INTERLOCUTORY APPEAL DOES NOT VIOLATE THE FEDERAL CONSTITUTION

The constitutional requirement that the choice of law be neither arbitrary nor unfair does not mandate that the choice-of-law analysis be conducted pre-certification. There has been no choice-of-law analysis conducted in this case. Rather, the Arkansas Supreme Court determined that Arkansas Rule 23 does not require lower courts to engage in a choice-of-law analysis pre-certification. As such, the Arkansas Supreme Court's decision is consistent with the Federal Constitution because: (A) the Federal Constitution does not require that a choice-of-law analysis be conducted prior to the certification of a nationwide class; (B) the Arkansas Supreme Court is the final arbiter with respect to an Arkansas rule of civil procedure; thus, there is no split among jurisdictions with respect to Arkansas Rule 23.

A. The United States Constitution Does Not Require that a Choice-of-Law Analysis Be Conducted Prior to the Certification of a Nationwide Class

1. The *Allstate* and *Shutts* Decisions

This Court's precedent concerning nationwide class-action lawsuits is clear—in the context of such a case, the constitutional limitations established by this Court in *Allstate* and *Shutts* must be observed. In both cases, this Court viewed its role as the arbiter of whether the *choice* of law itself was made in a constitutionally permissible manner—that is, whether the choice of law was "arbitrary or unfair." *Allstate*, 449 U.S. at 307 n.6 (recognizing that "only issue" before Court was whether choice of law was constitutional).

The constitutional limitations established in *Shutts* and *Allstate* plainly require that, for a state's law to apply to a nationwide class, that state must have "a significant contact or aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818; *see Allstate*, 449 U.S. at 307 (holding that the application of a particular state's law must "not [be] so arbitrary and unreasonable as to violate due process") (internal quotations omitted).

Although not a class-action case, the *Allstate* decision provided a foundation for the constitutional limitations that this Court later applied to the nationwide class action in *Shutts*. In *Allstate*, this Court affirmed the Minnesota Supreme Court's decision to apply Minnesota law in a case involving Minnesota residents, one of whom was killed in an automobile accident in Wisconsin. In that decision, this Court established the rule as derived from this Court's

precedent that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13.[14]

This Court applied that constitutional principle to the facts presented in *Allstate* and concluded that Minnesota Supreme Court's choice of its own law did not offend the Federal Constitution. That decision was based on three contacts Minnesota had with the parties and the occurrence that gave rise to the litigation. The first of those contacts was the decedent, who was a member of Minnesota's work force for 15 years preceding his death. The second of those contacts was the defendant, Allstate, which was at all times present and doing business in Minnesota. The third contact was the respondent, who became a Minnesota resident prior to filing suit.

This Court held that, because "Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." *Id.* at 320. Therefore, the choice of Minnesota law by the Minnesota Supreme Court was not contrary to the Due Process Clause or the Full Faith and Credit Clause of the United States Constitution.

In *Shutts*, this Court applied the *Allstate* holding to find that, in the context of a nationwide class action, the application of Kansas law to every claim in the

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[14] Although *Allstate* was a plurality, this Court recognized in *Shutts* that even the dissenting Justices were "in substantial agreement with this principle." *Shutts*, 472 U.S. at 818-19.

case was "sufficiently arbitrary and unfair as to exceed constitutional limitations." 472 U.S. at 798. The problem with the Kansas Supreme Court's choice of law in *Shutts* was that Kansas did not have an "interest" in the claims that were unrelated to that state. *Id.*

This Court reaffirmed its observation in *Allstate* that "in many situations a state court may be free to apply one of several choices of law," but also observed that the constitutional limitations laid down in the *Allstate* case "must be observed even in a nationwide class action." *Id.* at 823. Thus, this Court concluded that, for the Kansas court constitutionally to choose Kansas law to apply to a nationwide class, "Kansas must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate*, 449 U.S. at 312-13). Because this Court found that Kansas did not have the necessary contacts with the plaintiffs' claims, this Court held that the Kansas Supreme Court's choice of Kansas law was unconstitutional.

2. The Arkansas Supreme Court Decision Did Not Violate the Constitutional Principle Established in *Allstate* and *Shutts*

Despite GM's unremitting assertion that this Court's precedent—particularly this Court's *Shutts* decision—requires that a choice-of-law analysis be conducted pre-certification, GM concedes that this Court has, in fact, never mandated that result. *See* Pet. 18 (conceding that "this Court has yet to speak

directly to whether a choice of law analysis is constitutionally required at the certification stage").

In this case, GM asks this Court to review the Arkansas Supreme Court's decision in an interlocutory appeal to interpret an Arkansas rule of civil procedure based on Arkansas's class-action jurisprudence. If the posture of this case is not enough to prevent this Court from accepting jurisdiction at this stage, then the fact that there has been no substantive choice-of-law determination should preclude a review of GM's argument under this point.

While GM attempts to convince this Court that the Arkansas Supreme Court chose "to ignore the choice of law issue" (Pet. 14), even a cursory review of the decision below reveals that allegation to be false. Rather than ignore the choice-of-law issue, the Arkansas Supreme Court devoted a substantial portion of its opinion to analyzing the precise issue raised to that court in the interlocutory appeal: whether, under Arkansas Rule 23, a choice-of-law determination is required pre-certification.

The Arkansas Supreme Court decided that, based on Arkansas's class-action jurisprudence, a choice-of-law analysis should not be conducted prior to certification of the class. *See* Pet. App. 12a (finding that "any potential choice-of-law determination and application [is] similar to a determination of individual issues, which cannot defeat certification" under Arkansas Rule 23).[15]

The Arkansas Supreme Court likewise did not ignore the approach of other jurisdictions, which do

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[15] Like the Arkansas Supreme Court, the trial court below did not ignore the choice-of-law issue. *See* Pet. App. 85a-86a, 94a.

require a choice-of-law analysis pre-certification. Instead, that court acknowledged its rejection of the approach of other jurisdictions: "we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts." *Id.* at 13a.

Rather than require the rigorous-analysis approach applied under Federal Rule 23 that requires a choice-of-law analysis pre-certification, the Arkansas Supreme Court reaffirmed its longstanding precedent that Arkansas law affords its trial courts "broad discretion in determining whether the requirements for class certification have been met," while recognizing that a class can always be decertified in the future, if necessary. *Id.*; *see also* Ark. R. Civ. P. 23(b) ("An order under this section may be altered or amended at any time before the court enters final judgment.").

The Arkansas Supreme Court also rejected GM's claim that a failure to require a choice-of-law analysis pre-certification would allow that analysis to evade review. That is because, according to the Arkansas Supreme Court, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." Pet. App. 14a. In *Shutts*, for example, the Kansas Supreme Court reviewed the choice-of-law decision of a Kansas trial court only after that lower court had rendered a final order, and not in the context of an interlocutory appeal. 472 U.S. at 814-16 (observing that the Kansas trial court had applied

Kansas law to the class members' claims to find the defendant liable).[16]

Just as in *Shutts*, following a final determination by the trial court as to GM's liability in this case, either party could appeal the trial court's choice-of-law determination to the Arkansas Supreme Court and then to this Court. GM presents no convincing reason why the Arkansas Supreme Court's ruling that it would review the lower court's choice-of-law decision following a final order in this case would necessarily mean that the choice-of-law decision would evade the review of the appellate courts.

In rejecting GM's assertion that Arkansas Rule 23 should require a choice-of-law analysis pre-certification, the Arkansas Supreme Court also relied in part on its finding that, "were [it] to require the circuit court to conclude at this time precisely which law should be applied, such a decision could potentially stray into the merits of the action itself, which we have clearly stated shall not occur during the certification process." Pet. App. 14a. It is certainly within the purview of the Arkansas Supreme Court to rely on its more than two decades of class-action jurisprudence when interpreting Arkansas Rule 23.

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[16] In *Shutts*, the Kansas trial court certified a final class consisting of 28,000 members residing in all 50 states, the District of Columbia, and several foreign countries. 472 U.S. at 797. Prior to review by the Kansas Supreme Court, the trial court applied Kansas contract and equity law to every class member's claim to find the defendant liable. It was only after the trial court's final determination of liability that the Kansas Supreme Court reviewed the choice-of-law decision and affirmed the lower court. *Id.* at 814-16. Upon review by this Court, that decision was reversed because the Kansas Supreme Court's choice of law was arbitrary and, therefore, unconstitutional.

See, e.g., Mega Life & Health Ins. Co. v. Jacola, 954 S.W.2d 898, 900 (Ark. 1997) (recognizing that "neither the trial court nor the appellate court may delve into the merits of the underlying claim when determining whether the requirements of Rule 23 have been satisfied").

GM not only has failed to show how the Arkansas Supreme Court committed reversible error in this case, but also has failed to demonstrate how the decision below is contrary to the principles established in *Shutts* and *Allstate*. As previously discussed, *Shutts* and *Allstate* require lower courts to apply a choice-of-law analysis in a constitutional manner, meaning that the choice of law itself must not be arbitrary or fundamentally unfair. Those constitutional principles apply to the actual substantive choice-of-law decision and not to a state's procedural rules governing how class actions are brought and managed within that state.

Until a choice-of-law decision has been made in this case, any opinion by this Court concerning what that choice of law should be is merely advisory.

3. This Court's *Amchem* Decision Does Not Mandate a Choice-of-Law Analysis Pre-Certification

Not only is GM's reliance on *Shutts* and *Allstate* unconvincing, but its dependence on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), offers no basis for a reversing the decision below.[17] First,

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[17] The settlement class in *Amchem* was certified by. the United States District Court for the Eastern District of Pennsylvania and later decertified by the United States Court of

federal rules of procedure, and not Arkansas rules of procedure, governed the procedural aspects surrounding the certification and subsequent decertification of the class in the *Amchem* case. The decisions of federal courts concerning the application of Federal Rule 23 are not binding on the Arkansas Supreme Court, which is the final arbiter of Arkansas's procedural rules.

Second, the settlement class in *Amchem* bears little, if any, resemblance to the certified class in this case. The *Amchem* settlement class consisted of class members who were exposed to asbestos-containing products. Not only were those class members "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," 521 U.S. at 624, but the class members had suffered varying degrees of physical injury as a result of that exposure. They also differed in that each class member had a different history of cigarette smoking. Based on all those differences between the class members, the Third Circuit observed that the differences in state laws would also compound those disparities.

The class certified in this case is entirely different from the class in *Amchem*. As the court below found, two common issues in this case predominate over any other potential individualized issue: (1) "whether the parking-brake system installed in the class members' vehicles was defective" and (2) "whether GM attempted to conceal any alleged defect." Pet. App. 17a.

The Arkansas Supreme Court reiterated its previous holding that "the mere fact that individual issues

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Appeals for the Third Circuit, which this Court affirmed. *See Amchem*, 521 U.S. at 629.

and defenses may be raised by the defendant regarding the recovery of individual class members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members." *Id.* at 17a-18a. In contrast to *Amchem*, the common issues concerning the defendant's alleged wrongdoing predominate in this case.[18]

Third, there had been a choice-of-law determination made by a lower federal court prior to this Court's review of *Amchem*. After discussing the disparities among the plaintiff members of the settlement class in *Amchem*, this Court acknowledged the Third Circuit's choice-of-law discussion by noting that it had observed that the "[d]ifferences in state law . . . compound these disparities." 521 U.S. at 624. In applying a rigorous analysis pursuant to federal class-action jurisprudence in accord with Federal Rule 23, the Third Circuit determined that the laws of many states would apply to that case, further compounding the individualized issues.

Different from *Amchem*, in this case, there has been no determination as to which state's or states' laws might apply given the facts presented here. Because there has been no choice-of-law determination made below, a decision from this Court concerning such an analysis is premature. Further, simply because this Court acknowledged that the choice-of-

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[18] In its 51-page opinion, the trial court found that "the high-force spring clip retainer, if it is indeed defectively designed (an issue ultimately to be determined by the trier of fact), to create a common, inadequate shoe/lining float problem in all class vehicles, which is persistent, which occurs each time a class vehicle is driven, and which exists, if at all, from the time class vehicles roll off their respective assembly lines." Pet. App. 45a; *see also id.* at 48a.

law discussion was one of the reasons why the Third Circuit chose to decertify a class that was brought under Federal Rule 23 does not lead to the conclusion that this Court mandates a choice-of-law determination during the certification stage of a class-action lawsuit brought pursuant to Arkansas Rule 23. As GM conceded in its petition, "this Court has yet to speak directly to whether a choice of law analysis is constitutionally required at the certification stage." Pet. 18.

GM also contends that the failure of the Arkansas Supreme Court to require a choice of law pre-certification means that the notice that eventually will be sent to class members will necessarily be insufficient. Not only is this argument not persuasive, it is improper at this preliminary stage of the litigation.

Pursuant to Arkansas Rule of Appellate Procedure-Civil 2, the Arkansas Supreme Court has jurisdiction only to consider whether the circuit court abused its discretion in choosing whether to certify the class. *See, e.g.*, Pet. App. 5a. A challenge to the notice requirement of Arkansas Rule 23 should be made in the form of an argument to the trial court rather than in the form of speculations tagged onto an interlocutory appeal concerning class certification. In making this argument, GM seeks an advisory opinion with respect to an issue that is not yet ripe for this Court's consideration.

B. The Arkansas Supreme Court Is the Final Arbiter with Respect to an Arkansas Rule of Civil Procedure; Thus, There Is No Split Among Jurisdictions with Respect to Arkansas Rule 23

Notwithstanding GM's complaint to the contrary, there is not a true "split among the courts" (Pet. 18) on the issue presented in this petition. The issue presented here is the interpretation of Arkansas Rule 23 and the application of Arkansas's class-action jurisprudence based on that rule.

Arkansas courts are simply not obligated to apply Federal Rules to cases arising in state courts. The state rules of procedure apply to this case, which was brought in state court. And, because the Arkansas Supreme Court is the final arbiter concerning an Arkansas rule of civil procedure, there is no true "split" among authority presented here. GM's argument in favor of this Court granting its petition is, therefore, unpersuasive.[19]

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[19] None of the cases cited by GM refer to Arkansas Rule 23. Rather, all but two of those cases are federal court decisions applying Federal Rule 23. *See* Pet. 19 n.8. Concerning GM's citations to two state court decisions, it is notable that, unlike how the Arkansas Supreme Court interprets Arkansas Rule 23, those courts apply a rigorous analysis when interpreting their Rule 23 that is consistent with the analysis applied to Federal Rule 23. *See* Ala. Code § 6-5-641(e) (1975) (requiring a rigorous analysis under Alabama's Rule 23); *see also Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1085 (Cal. 2001) (adopting Federal Rule 23's approach of requiring a choice-of-law analysis pre-certification). Neither was Arkansas Rule 23 involved in any case cited by GM as consistent with Arkansas's approach to the timing of the choice-of-law analysis. *See* Pet. 20 n.9.

C. The Laws of Multiple States Will Not Necessarily Be Applied to the Claims Raised in this Case; the Differences in State Laws Are Speculative in Light of the Fact that There Has Been No Choice-of-Law Decision at this Stage in the Litigation

GM's argument (Pet. 21-31) presupposes a conclusion to a choice-of-law analysis that is yet to be conducted by any court. GM wishes to convince this Court that the law of every state will necessarily apply. Arguably, the law of only one state could be applied in a constitutionally permissible manner, similar to the application of Michigan law by the Oklahoma Supreme Court in *Ysbrand v. Daimler-Chrysler Corp.*, 81 P.3d 618 (Okla. 2003), *cert. denied* 542 U.S. 937 (2004) (holding that the application of Michigan law to some of the claims of a nationwide class was consistent with *Shutts* because there was a significant aggregation of contacts with this case to Michigan so that the application of Michigan law to the nationwide class action presented was not arbitrary or fundamentally unfair).

Because no choice-of-law determination has been made by a court in this case, an argument concerning which law will be applied is merely speculative. Therefore, the allegations made by GM here do not support GM's attempt to have this Court grant its petition.

III. THE QUESTIONS PRESENTED HERE ARE OF DIMINISHING SIGNIFICANCE IN LIGHT OF THE CLASS ACTION REFORM ACT OF 2005

This case was filed in Arkansas state court prior to Congress's passage of the Class Action Fairness Act of 2005 ("CAFA"). Congress implemented CAFA to expand the jurisdiction of federal courts over many large class-action lawsuits. *See* 28 U.S.C. §§ 1332(d), 1453, 1711-1715. As a practical matter, under CAFA, most if not all nationwide class-action lawsuits will be removed to federal court.

In light of CAFA's comprehensive congressional reform to class-action litigation, any question raised by GM in this case is one of diminished significance, as CAFA has largely eliminated state court jurisdiction over large class-action cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 08-349

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY

Petitioner, General Motors Corporation ("GM"), submits this reply in response to the brief in opposition ("Opp.") filed herein by Respondent, Boyd Bryant ("Mr. Bryant").

Mr. Bryant's brief is premised on the misguided notion that the Arkansas Supreme Court has unfettered authority to interpret state procedural rules without regard to overriding constitutional principles. While the federal system affords states broad discretion to enact laws, they are not free to enact or apply those laws in ways that subvert federally protected constitutional rights. The requirements of due process and full faith and credit bar states from interpreting their laws in ways that evade those limits.

GM's petition demonstrates that the Arkansas Supreme Court's final decree – that no choice of law determination is required before certifying a massive nationwide class of four million vehicle owners from every state in the nation – violates both GM's and the absent class members' fundamental due process rights by injecting arbitrariness, uncertainty, lack of notice, and unfair surprise into the proceedings. Moreover, certifying a nationwide class without considering the varying state laws fails to give full faith and credit to the laws of the fifty states and the District of Columbia.

Mr. Bryant's argument that the constitutional issue was not raised below is contrary to the record. Similarly, his contention that the ruling below is merely "interlocutory" and not subject to review by this Court

lacks merit and, indeed, Mr. Bryant's brief essentially does not analyze the governing provision on this issue, 28 U.S.C. § 1257(a).

This Court has the power to intercede on behalf of litigants whose federal constitutional rights are at stake. The constitutional issues raised in GM's petition are significant, and thus GM asks this Court to intercede in this matter.

I. THE CONSTITUTIONAL ISSUE WAS SQUARELY RAISED BELOW.

Mr. Bryant's suggestion that GM did not preserve the constitutional issue below is inexplicable. Opp. at 11-12. The central question GM presented to the Arkansas courts was whether a choice of law analysis was required before certifying a nationwide class. GM made virtually every argument in the briefing below in this precise context. GM repeatedly referenced this Court's choice of law decisions, and specifically *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

For example, in GM's original brief before the Arkansas Supreme Court, GM noted as follows:

> This appeal presents an issue of first impression that merits careful scrutiny by this court — in particular, whether a nationwide action involving products liability claims under the laws of all 51 jurisdictions can or should be certified. That issue implicates important public policy and *constitutional* concerns.

GM's Original Brief (Ark.S.C.) at 1 (emphasis added). In the same brief, under a section heading entitled "The Circuit Court Erred by Failing to Consider the Legal Variations," GM made the very argument made in the petition before this Court:

> The circuit court's decision [failing to address choice of law] is also contrary to constitutional principles. The United States Supreme Court requires an individualized choice-of-law analysis in a nationwide class action. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985); *see also In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005); *In re Prempro*, 230 F.R.D. at 562 ("in nationwide class actions, choice-of-law constraints are constitutionally mandated"). The *Shutts* Court said, as a matter of due process, that the state law to be applied to each class member's claim must be "neither arbitrary [n]or fundamentally unfair." 472 U.S. at 821. "[I]f a state has only insignificant contact with the parties and the . . . transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981). *Shutts* emphasized that "constitutional limitations [on choice of law] must be respected even in a nationwide class action. 472 U.S. at 821. If the circuit court's deferral of the choice of law issue were allowed to stand, this fundamental constitutional question would effectively evade this Court's review.

Id. at 6-7.[1] Additionally, in a section of GM's Arkansas Supreme Court reply brief entitled "The Circuit Court Erred by Failing to Consider the Legal Variations," GM reiterated the same point:

> Put simply, a "court must make a choice of law determination, in the first instance, when a controversy" potentially involves multiple state laws. 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 13:37, at 438 (4th ed. 2002). "[C]ourts can hardly evaluate the claims, defenses or applicable law [for a nationwide class] without knowing what the law is." *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004). Indeed, "due process" requires consideration of "the choice of law issues . . . before certification." *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998); GM Br. at Arg. 5-7.

GM's Reply Brief (Ark.S.C.) at 4.

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[1] Later in that brief, GM argued:

> Due process would also require application of each state's laws to the claims of its citizens, as noted above in the discussion of the *Shutts* case. 472 U.S. 797 at 821-23. *See also State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (each state must be allowed to make its own reasoned judgment about what conduct is permitted within its borders).

Id. at 11.

Thus, it is difficult to see what more GM could have said to have preserved the issue. Mr. Bryant does not explain how the language cited above could be insufficient. GM argued directly that the circuit court's failure to address choice of law before certification was "contrary to constitutional principles" and specifically *Shutts*. The constitutional issue was unquestionably presented with "fair precision and in due time" and the Arkansas Supreme Court had "a fair opportunity to address the federal question." *Adams v. Robertson*, 520 U.S. 83, 87 (1997).[2] Indeed, the Arkansas Supreme Court not only acknowledged GM's due process argument but recognized it as a question of first impression.[3] Thus, the federal issue was clearly presented.

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[2] The *Adams* case on which Mr. Bryant relies so heavily bears no resemblance to the present matter. Opp. at 8-12. The petitioner in *Adams* apparently raised the constitutional issue only indirectly in the context of *another* argument, not in the context of the argument before this Court. In the present matter, the *Shutts* constitutional analysis was raised in exactly the same context, both before the Arkansas Supreme Court and in the petition before this Court – *i.e.*, choice of law has to be addressed prior to certification because of its constitutional significance.

[3] Specifically, the Arkansas Supreme court under the heading "Choice of Law" began its analysis as follows:

> General Motors initially argues that the significant variations among the fifty-one motor vehicle product defect laws defeat predominance and prevent certification in the instant case. It contends that a choice-of-law analysis must be conducted prior to

(Cont'd)

II. THE CONSTITUTIONAL QUESTION HAS BEEN FINALLY DETERMINED UNDER 28 U.S.C. § 1257(a).

Mr. Bryant's analysis of whether the Arkansas Supreme Court's decision is subject to review consists primarily of repeating the word "interlocutory." Opp. at 1, 5, 8, 14, 16-18, 22, 28. His brief, however, barely mentions the controlling provision on this issue (28 U.S.C. § 1257(a)), and does not discuss a single case interpreting that provision. In particular, his brief ignores entirely *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Petition ("Pet.") at 9. In *Cox* this Court informed that it takes a "pragmatic approach" to "determining finality," such that whether a state court calls the decision below "interlocutory" does not determine whether the ruling is "final" under § 1257(a). 420 U.S. at 477, 486. Mr. Bryant takes no notice that this Court "recurringly" has granted review in cases "in which the highest court of a State has finally

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(Cont'd)

> certification of the class and that the circuit court's failure to conduct such an analysis at this junction permits due-process considerations to evade this court's review.

App. at 6a. The Arkansas Court's opinion continued:

> A question of first impression still, remains, however, as to whether an Arkansas circuit court must first conduct a choice of law analysis before certifying a multistate class action.

Id. at 11a.

determined the *federal* issue presented in a particular case, but in which there are further proceedings in the lower state courts to come." *Id.* at 477 (emphasis added). Here, the Arkansas Supreme Court finally determined that no choice of law determination is required before certifying a nationwide class. Mr. Bryant cannot argue that anything more needs to be decided with respect to that *federal* question.

Mr. Bryant also fails to address GM's additional § 1257(a) arguments. First, he offers *no explanation* as to how notice that comports with due process can now be provided to class members without a choice of law determination having first been made. Pet. at 8, 16-18. Class members must make decisions about whether to remain in the class, and have their claims subject to *res judicata*, without the opportunity to make an informed decision about what their legal rights are. Second, Mr. Bryant provides no explanation for how the constitutional issue could ever make its way back to this Court given the lower courts' phase I and phase II trial plan which backloads all issues of significance into thousands or millions of individual trials. *Id.* at 10-11.[4]

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[4] Mr. Bryant's assertion that GM's challenge to the trial plan was not argued by GM below is wrong. Opp. at 17. GM argued in the Arkansas Supreme Court that a class action would be unmanageable because of the "substantial number of individualized issues [that] would need to be resolved in phase II of a bifurcated proceeding," and as a part of that argument, GM quoted essentially the same language from the trial plan that is quoted in GM's petition to this Court. *See* GM's Original Brief (Ark.S.C.) at 28; Pet. at 10. Both of the decisions below recognized that GM had frontally challenged the workability of the bifurcated trial plan. App. at 18a-20a, 93a-107a.

Third, Mr. Bryant ignores that this Court has often accepted review when important federal constitutional rights are at issue. *Id.* at 12.

Instead Mr. Bryant misdirects the Court to *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Opp. at 14-17. That case neither involved a federal constitutional issue nor 28 U.S.C. §1257(a). Rather, it addressed the collateral-order exception and the "death knell" doctrine in connection with jurisdiction under 28 U.S.C. § 1291. Neither § 1291 nor the exceptions thereto are relevant here, and GM's arguments above have nothing to do with the "death knell" doctrine.

III. THE CONSTITUTION REQUIRES THAT CHOICE OF LAW BE ADDRESSED PRIOR TO NATIONWIDE CERTIFICATION.

Mr. Bryant seeks to avoid the constitutional issue by attempting to cleverly re-phrase it. There is no constitutional issue, he asserts, but rather merely an issue with regard to how Arkansas' class action rules should be interpreted. And, thus, he claims there is no split of authority since only the Arkansas Supreme Court has interpreted those rules. That does not withstand scrutiny.

A. Procedural Rules Are Not Exempt From Constitutional Constraints

Mr. Bryant frames the issue as "the interpretation of Arkansas Rule 23 and the application of Arkansas's class-action jurisprudence." Opp. at 28. But the issue presented is not dependant on Rule 23. The issue is

whether the principles of due process and full faith and credit embodied in the United States Constitution and outlined in *Shutts* require choice of law to be determined prior to certification in a class action involving citizens from 50 jurisdictions who have no contact with Arkansas.

Mr. Bryant admits that there are constitutional restrictions on choice of law but wrongly postulates that there are no similar constitutional restraints on a state's interpretation of its procedural rules governing class actions. Opp. at 19, 22-23. To the contrary, although state courts are generally permitted to interpret their own laws, there are "federal constitutional limitations." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981). Indeed, *Shutts* itself teaches that there are constitutional restrictions on a state court's interpretation of its laws, that the rights of the individual, absent class members must be considered, and that arbitrary and unfair determinations exceed constitutional limitations. 472 U.S. at 818, 821; Pet. at 14-15.[5] Thus, merely because Arkansas does not require

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[5] In *Shutts*, the Court held that, although a forum state has some freedom to select among the potentially applicable rules of decision, the Due Process and Full Faith and Credit Clauses require that the selection be made from among bodies of law bearing a sufficient relationship to the claims at issue. 472 U.S. at 818. In this way, the Constitution imposes substantive "restrictions" on the manner in which a state may conduct its choice-of-law inquiry in a multistate class action. *Id.* In *Shutts*, this Court held that the Kansas court could not simply "bootstrap" its personal jurisdiction over the plaintiffs into a justification for applying Kansas law to claims in which Kansas otherwise would not have a cognizable interest. *Id.* at 821. (Cont'd)

a "rigorous analysis"[6] of the procedural requirements for class certification (Opp. at 23) does not mean that Arkansas courts can abdicate their duty in a nationwide class action to perform an analysis that comports with due process and respects the interests of sister states. *The United States Constitution is not subject to Ark. R. Civ. P. 23, it is the other way around.*

The decision below, which certified a class of four million vehicle owners in every part of the country without any consideration of the policy interests of the class members' home states, was wholly arbitrary and, therefore, exceeded constitutional limitations. Pet. at 14-16. Without knowing what law applies, it is impossible to evaluate the claims, much less make a determination as to whether either facts or legal issues are common to the class. Simply presuming that

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(Cont'd)

Rather, the constitutional substantive limitation on choice of law requires that a state court make an *individualized* determination that the law applied "have 'significant contact or significant aggregation of contacts' to the claims asserted by each member . . . in order to ensure that the choice of []law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate*, 449 U.S. at 312-313 (emphasis added)).

[6] The "rigorous analysis" standard derives from this Court's decision in *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982). "Recognizing the important due process concerns . . . inherent in the certification decision, the Supreme Court requires district courts to conduct a rigorous analysis" of the class criteria. *Unger v. Amedisys*, 401 F.3d 316, 320-21 (5th Cir. 2005). *See also Ex parte Mercury Finance Corp.*, 715 So.2d 196, 198 (Ala. 1997).

generically defined concepts of "defect" and "concealment" are common is not only uninformed and random but precisely the type of bootstrapping this Court condemned in *Shutts*. *Id.* at 21.

Differences in the various state laws "are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/ Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (citing *BMW v. Gore*, 517 U.S. 559, 56873 (1996)), *cert. denied*, 537 U.S. 1105 (2003)). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *Id.* at 1021 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). The failure by the Arkansas courts to even consider what laws might apply resulted in a violation of the litigants' constitutional rights.[7]

B. There Is a Split of Authority on the Constitutional Issue

Mr. Bryant argues there is no split among the courts on the issue because the Arkansas Supreme Court is the only arbiter of Arkansas procedural rules. Opp. at 29. As noted above, the issue presented is not confined

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[7] The brief in opposition says that this nationwide class action may not be governed by all 51 laws, perhaps just Michigan law. Opp. at 30. That approach to choice of law in nationwide class actions has been roundly rejected, but it is irrelevant to GM's petition. The focus of GM's petition is not that all 51 laws must be applied, only that the choice of law analysis must be performed prior to certification.

to a narrow interpretation of a procedural rule. The issue is whether there is an overriding constitutional requirement on a procedural rule like Ark. R. Civ. P. 23. On that issue, there is a split among the courts—both federal and state. Pet. at 18-20.

IV. THE CLASS ACTION FAIRNESS ACT DOES NOT IMPACT THE SIGNIFICANCE OF THE CONSTITUTIONAL ISSUE.

Mr. Bryant claims that this Court should not entertain GM's petition because of the passage of the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1443) ("CAFA"). Opp. at 31. However, CAFA is irrelevant for two reasons. First, Mr. Bryant's argument erroneously presupposes that the constitutional issue is inapplicable to federal class actions. It is not. Whether federal constitutional principles require consideration of the choice of law analysis before certification of a nationwide class applies equally to nationwide class actions in federal court. And, as noted in GM's petition, there is a split on the choice of law issue within the federal courts. Pet. at 18-20. Second, Mr. Bryant's CAFA argument ignores the reality that *many* pre-CAFA nationwide class actions are still pending against national companies in state courts, including many in just the one county in Arkansas where the present matter is pending. A decision by this Court on GM's petition will greatly impact those cases as well.

CONCLUSION

GM respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 08-349

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL CHAMBER LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an *amicus* to inform courts about the implications of legal developments for its members.

Amicus curiae Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property/casualty insurance companies. PCI members are domiciled in and transact business in all 50 states and the District of Columbia and Puerto Rico. PCI member companies include all types of insurers, including national insurance companies, midsize regional writers, insurers doing business in a single state and specialty companies.

Amicus curiae Chamber of Commerce of the United States of America is the world's largest federation of business companies and associations, representing an underlying membership of more than three million business and professional

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of the intention to file this *amicus* brief.

organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

This case presents a question of great importance to *amici* regarding the scope of a court's constitutional obligation to inquire into variations in the state laws governing the claims of out-of-state class members before undertaking jurisdiction over such class members' claims by certifying a nationwide or multi-state class. Here, the trial court, in a decision affirmed by the Arkansas Supreme Court, declined to make any inquiry into variations in state law before certifying a nationwide class on state law claims regarding an alleged defect in the parking brakes in certain General Motors (GM) vehicles.

The Arkansas Supreme Court's decision on the important constitutional issues presented by this case conflicts with decisions by other courts around the country, including the United States Court of Appeals for the Eighth Circuit, which has held that the United States Constitution requires consideration of choice of law before certification of a nationwide class. *See In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005).

Amici's members have a substantial interest in this issue. Insurance companies and other businesses are subject to the varying laws of the states where they do business. Because they often transact business with millions of consumers throughout the country, they are frequently targets of multi-state class action litigation, in which variations in the state laws and regulations governing their conduct are (or should be) a determinative factor in whether a class action can be conducted without serious detriment to the defendant's constitutional rights to defend itself and

to have the claims against it litigated under the appropriate state law.

Nationwide or multi-state class action litigation imposes enormous expense and burden upon a defendant. Where a court (such as the Arkansas trial court in this case) proceeds to nationwide or multi-state class certification without making a determination as to the law or laws applicable to the class members' claims, the defendant is subjected to that expense and burden without appropriate assurance that class certification meets constitutional requirements under the Due Process Clause and the Full Faith and Credit Clause of the United States Constitution. The expense and burden are not removed or lessened if class certification is reversed on a later appeal. Moreover, certification of a nationwide or multi-state class may subject the defendant to overwhelming pressure to settle even claims of dubious merit. Thus, the Arkansas practice of postponing the determination as to the content of and differences in state law may, as a practical matter, escape review altogether if not reviewed now.

SUMMARY OF ARGUMENT

The Court should review and reverse the Arkansas Supreme Court's ruling that, in deciding to certify a nationwide class, a trial court need not take into account the effect of variations in state law. The Arkansas Supreme Court's decision raises important constitutional concerns under both the Due Process Clause and the Full Faith and Credit Clause. *See* U.S. Const. art. IV, § 1; U.S. Const. amend XIV, § 1.

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (citation omitted). In certifying a nationwide class, a trial court assumes jurisdiction

over the claims of millions of persons whose transactions with the defendant have no connection to the forum state. Such an assumption of jurisdiction raises constitutional concerns as to the policy interests of the class members' home states in developing and deciding their own law and having that law applied to the claims of their own residents. It also raises constitutional concerns as to how to protect the fundamental fairness of the contemplated proceedings, from the standpoint of both absent class members and the defendant.

A judicial determination before class certification of what law applies to the claims of putative class members from different states and the effect of variations in state law on whether the requirements for class certification are met is a necessary means of ensuring fundamental fairness in the certification of nationwide or multi-state classes. Such an initial determination assures that defendants and out-of-state class members are not deprived of their due process right to have applied the law of a state with some significant contact or aggregation of contacts to the claims of the particular class members. Without such a determination, a proper analysis of the prerequisites for class certification is impossible. These prerequisites have a significant due process component because they function to safeguard the fairness of class action proceedings.

Thus, substantial due process concerns are raised by the procedure, now enshrined in Arkansas law, of certifying a nationwide or multi-state class, and thereby assuming jurisdiction over the claims of out-of-state class members, without any consideration of the laws of the class members' home jurisdictions. Due process requires, as part of the class certification analysis, at least a preliminary determination as to what state's laws will apply to given issues and some consideration of the potential difficulties of applying the various states' laws.

The Arkansas Supreme Court's decision also raises

substantial issues of full faith and credit. By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," the United States Constitution establishes "'barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 n.16 (1996) (citation omitted). Certification of a multi-state or nationwide class necessarily implicates the Full Faith and Credit Clause, as that Clause requires that the class members' claims be governed by the law of a state having "a 'significant contact or significant aggregation of contacts'" to the transactions in question. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citation omitted).

The claims in this case regarding consumer practices and product warranties involve a traditional area of heightened state-by-state regulation and enforcement and implicate important state policy concerns. Likewise, the business of insurance has traditionally been regulated by each state within its own boundaries. In both contexts, the Constitution mandates that each state respect the laws, regulatory interests and policy concerns of other states. The Arkansas Supreme Court's ruling that Arkansas courts need not make any inquiry into variations in state law before certifying a nationwide class disregards that constitutional mandate and infringes the interests of co-equal sovereigns.

The Arkansas Supreme Court's ruling is a final determination of this issue and is ripe for review by this Court. This Court should grant certiorari to resolve the important federal constitutional questions raised by the Arkansas Supreme Court's decision.

I. DUE PROCESS REQUIRES A CHOICE OF LAW DETERMINATION BEFORE CERTIFICATION OF A NATIONWIDE OR MULTI-STATE CLASS ACTION

Litigants, including defendants and absent class members, "have a due process right to have their claims governed by the state law applicable to their dispute." *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998). Accordingly, "in nationwide class actions, choice of law constraints are constitutionally mandated." *Id.* In *Phillips Petroleum,* this Court made clear that due process forbids an arbitrary or unfair application of forum law, thus protecting a person's or entity's justifiable expectation that a particular state's law will apply to a transaction where the person has conformed his conduct to comply with the state's regulations. Due process also protects contractual rights and does not allow a state to affect the terms of contracts made and performed outside the state, absent a significant contact or aggregation of contacts with the transaction. *See Phillips Petroleum*, 472 U.S. at 821-22; *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 409-10 (1930) (Due Process Clause prohibited Texas from creating "rights and obligations" with respect to insurance contracts that were not made or performed in Texas). The requirements of due process are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations [on choice of law] because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Phillips Petroleum*, 472 U.S. at 821.

Under this Court's precedents, due process and full faith and credit require a choice of law determination in a nationwide class action in which state law claims are asserted. The particular issue presented in this case is when that determination should or must occur. *Amici* submit that constitutional considerations require that the

determination be made early on in the process of deciding whether or not class certification should be granted.

Choice of law issues should be decided as part of the class certification analysis because if state laws vary (as they often do), the need to apply varying state laws will greatly impact the propriety of class certification. As the court stated in *In re Prempro Products Liability Litigation*, choice of law "must be tackled" at the outset of the class certification determination because "it pervades every element of [Rule] 23." 230 F.R.D. 555, 561 (E.D. Ark. 2005).[2] Indeed, variations in state law affect not only the requirement of that common issues predominate, but also typicality, adequacy of representation and superiority.

The requirements for class certification are more than mere procedural rules concerned with efficiency and manageability. Rather, these requirements are designed to ensure that a class litigation will be fair both to absent class members and to the defendant. Accordingly, the class action requirements implicate the fundamental fairness requirements of due process. A procedure (such as that adopted by the Arkansas courts in this case) that short-circuits the proper analysis of those requirements raises issues of constitutional concern to this Court.

Thus, because of the importance of the choice-of-law analysis in determining whether class action requirements are met, the due process concerns at stake in this case are twofold. They include not only the due process concerns directly related to choice of law, but also the need to ensure that the class action determination itself and class proceedings, if a class trial is conducted, meet the due process requirements of fundamental fairness.

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[2] Arkansas Rule of Civil Procedure 23 is similar to Federal Rule of Civil Procedure 23. *See* App. 4a-5a.

In particular, the "vital prescription" that common issues predominate assures that a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Class cohesion" legitimizes representative litigation by ensuring that the class members' claims can be resolved fairly on a mass basis. It ensures that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13; *see also Amchem*, 521 U.S. at 621 (the "dominant concern" under Federal Rule of Civil Procedure 23 is "whether a proposed class has sufficient unity so that absent members can *fairly* be bound by decisions of class representatives") (emphasis added).

The requirements of class cohesion and predominance also ensure fundamental fairness for class action defendants, as well as absent class members. As one court observed:

> [S]ections 23(a)(2) and (a)(3) are calculated to ensure that regardless of whether the class representatives and all class members win and the opposing party loses, or alternatively if the class representatives and class members lose and the opposing party wins, all who are affected on both sides will have had a fair opportunity to have their claims or defenses heard and determined on the merits.
>
> While it is relatively simple to evaluate the merits of a dispute involving one plaintiff and one defendant, fairness to both sides in a class action is a far greater challenge and places considerable responsibility on the Court. If a class representative with a weak case loses and individual class members with strong cases are bound by the negative outcome, an injustice will have occurred.

> Similarly, if a winning class representative's claim and the class member claims are dissimilar, it may be unjust for the opposing party (usually the Defendant) to be responsible for the claims of class members. The Court's responsibility is to make sure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives.

Cooper v. Southern Co., 205 F.R.D. 596, 608-09 (N.D. Ga. 2001), *aff'd*, 390 F.3d 695 (11th Cir. 2004), *overruled in part on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006).

When the predominance inquiry fails to identify at the outset the legal issues presented by the claims of the putative class representatives and putative class members, it is not possible to make a proper and accurate finding of predominance. *See, e.g.*, *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) ("'[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (citation omitted)). As the Texas Supreme Court has explained,

> [i]n the context of a nationwide class action, the determination of the applicable substantive law is of paramount importance. If the court does not know which states' laws must be applied, it cannot determine whether variations in the applicable laws would defeat predominance . . . .

Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 672 (Tex. 2004); *see also Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000) ("[t]he district court is required to know which law will apply before it makes its predominance determination"). As these courts have recognized, the determination as to

whether common issues predominate over individual issues involves a weighing, and unless the issues are identified and considered, the weighing is *ipso facto* faulty.

Moreover, a trial court may not escape the necessity of a choice of law determination by purporting to identify "predominating" common factual issues, as the Arkansas trial court did here. What facts are relevant is defined by the applicable law, and where the applicable law is different, the relevant facts may also be different. Thus, the identification of common factual issues for purposes of determining whether common issues predominate and whether class action proceedings will allow a fair resolution of the class members' claims depends upon choice of law.

The choice of law inquiry in a nationwide or multi-state class action also is necessary to ensure that the due process concerns embodied in the requirements of adequate representation, typicality, and superiority are met. *See Lapray*, 135 S.W.3d at 672 ("an extensive choice of law analysis" is required for "predominance, superiority, cohesiveness, and even manageability"). In a class action, "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J. concurring in part and dissenting in part); *see also Phillips Petroleum*, 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.").

The inquiry into whether the named plaintiff's claims are typical of the class and whether the named plaintiff can adequately represent the proposed class is also significantly affected by, and requires prior resolution of, the choice of law issues and the issue of what states' laws are to be applied. Without consideration of the laws that apply and the

extent of variation among them, it cannot be determined whether the claims of absent class members from other states "are fairly encompassed within the named plaintiff's claim." *Falcon*, 457 U.S. at 160. If the legal rights at issue vary from state to state, plainly the interests of the absent class members are *not* fairly encompassed by the named plaintiff's claim, and the absent class members are not adequately represented.[3]

The importance of the inquiry into divergent state laws as relevant to class certification and the elements of Rule 23 has been repeatedly recognized by and emphasized by the courts. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 & nn. 96-97 (D.C. Cir. 1986) (requiring a "considered predomination determination" by the trial court, including "'extensive analysis' of state law variances") (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) ("Scrutinizing [the defendant's alleged practices] under the provisions of fifty jurisdictions complicates matters exponentially."); *id.* at 1025 ("[T]he problems with trying the individualized elements of the plaintiff's claims . . . are compounded by the necessity of referencing fifty sets of credit card and consumer protection laws."); *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (even where state laws differ only in nuance, nuance can be significant, leaving district court with "an impossible task of instructing a jury on the relevant law"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297, 1300 (7th Cir. 1995) (decertifying nationwide class; rejecting district court's proposal "to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world"); *Central Wesleyan College v.*

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[3] A defendant is of course "obviously and immediately injured if [a] class-action judgment against it bec[omes] final without binding the plaintiff class." *Phillips Petroleum*, 472 U.S. at 805.

W.R. Grace & Co., 6 F.3d 177, 189 (4th Cir. 1993) (use of subclasses to allow juries to consider different state laws will still "pose management difficulties and reduce the judicial efficiency sought to be achieved through certification"). Although these cases were decided under Federal Rule of Civil Procedure 23, the close relationship of Rule 23's requirements to constitutional due process concerns makes the holdings of these cases relevant to the issue here, namely, the necessity of a choice of law analysis to ensure that due process is met in the class certification process.

The instant case illustrates how far the class certification inquiry can stray from the underlying guarantees of fairness provided by the requirements of the class action rule when issues of varying state law are excluded from the predominance determination. The Arkansas Supreme Court identified two purportedly common factual issues raised by plaintiffs' claims, defect and concealment, that the court deemed predominant. *See* Pet. at 21. As shown in the Petition, these concepts are legally defined. *See id.* at 22-31. Thus, for example, antecedent to any factual determination of whether a defect existed in GM parking brakes for purposes of warranty law, the legal definition of "defect" would have to be determined. Where, as here, a nationwide class is sought, the legal definition of defect would be a matter of potentially varying state law, and indeed, as shown in the Petition, state laws vary significantly on the issue of what constitutes a defect as well as on the issue of concealment. *See* Pet. at 21-22; *see also, e.g., Chin*, 182 F.R.D. 448, 455 (rejecting argument that whether product was defective presented a class-wide factual issue: "[f]irst, whether or not there is a defect would have to be decided according to the laws of each of the 52 applicable jurisdictions").[4]

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[4] In analyzing similar due process concerns in the context of collateral estoppel, the Ohio Supreme Court refused to give

The Arkansas Supreme Court, like the Arkansas trial court, simply ignored the legal issues inherent in what it deemed the purely factual questions of defect and concealment. The court adhered to its view that a trial court need not consider variations in state law before certifying a nationwide class because even if "'reference'" to the laws of other states turns out to be necessary, it "'does not seem a particularly daunting or unmanageable task.'" App. 10a (citation omitted). The Arkansas Supreme Court also reiterated its rejection of any requirement that Arkansas trial courts conduct a "rigorous" analysis of the requirements for class certification, explaining that a class can always be decertified. App. 13a.

By postponing indefinitely any obligation by the trial court to assess variations in state law and their effect on the propriety of class certification, the Arkansas Supreme Court has established a process that is unfair and unconstitutional. That process will result in substantial injury to defendants that are subjected to the burden and expense of defending massive class litigations that as a matter of due process exceed the proper scope of the certifying court's jurisdiction and authority. This Court should grant review to correct that constitutional error.

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collateral estoppel effect to a Florida jury's finding that the defendant's lawn mower was defectively designed. *See Goodson v. McDonough Power Equip.*, 443 N.E.2d 978, 981-88 (Ohio 1983). The Ohio court not only noted that Florida law governing the issue was different from Ohio law, *id.* at 988, but stressed the policy concerns raised by allowing a single jury to "establish safety standards for a given product for the entire country." *Id.* at 987. The court also described the complexity of decision-making by courts and juries on such issues, *see id.* at 986, and the danger that "'the first litigated determination of an issue may be wrong.'" *Id.* at 986 n.14 (citation omitted).

II. THE FULL FAITH AND CREDIT CLAUSE REQUIRES A TRIAL COURT TO CONDUCT AN ANALYSIS OF THE APPLICABLE STATE LAWS BEFORE CERTIFYING A NATIONWIDE CLASS

In certifying a nationwide class, a court assumes jurisdiction over the claims of millions of persons whose transactions have no connection to the forum state. If such a class is certified without considering choice of law, the consequent displacement of the diverse laws of the class members' home states and infringement on the interests of those states in regulating transactions within their borders and in developing and deciding their own law raises constitutional concerns of full faith and credit.

By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 1, the United States Constitution establishes "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *accord BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 & n.16 (1996). Pursuant to the Full Faith and Credit Clause, a State cannot "'legislate except with reference to its own jurisdiction,'" and each State's power "is also constrained by the need to respect the interests of other States." *BMW*, 517 U.S. at 571 (citations omitted).

This means that certifying a nationwide class has an inevitable constitutional dimension under the Full Faith and Credit Clause, which requires that each class member's claims be governed by the law of a state having "a 'significant contact or significant aggregation of contacts'" to the class member's transaction, with an individualized choice-of-law analysis of each class member's claim. *Phillips Petroleum*, 472 U.S. at 821-22.

Relying on these constitutional principles, the Eighth Circuit reversed class certification in a decision that is directly in conflict with the decision of the Arkansas Supreme Court in this case. *See In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1118-21 (8th Cir. 2005). In *St. Jude*, a putative nationwide products liability class action brought against a manufacturer of prosthetic heart valves, the Eighth Circuit held that the "district court's class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law." *Id.* at 1120. The Eighth Circuit opined that "'[s]tate consumer protection laws vary considerably, and courts must respect these differences.'" *Id.* (alteration in original; citation omitted).

The assumption by a single state court of jurisdiction over claims of absent class members across the country without due consideration of varying state laws threatens policy concerns that go to the heart of our federal system. The varying state laws on consumer rights and product liability reflect each state's judgment as to the social and economic needs of its citizens. *Cf. BMW*, 517 U.S. at 568-70 ("[T]he States need not, and in fact do not, provide [consumer] protection in a uniform manner. . . . The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 states."). The right of each state to make its own policy judgments and to develop its own laws regarding such matters is a crucial and beneficial component of the federal system established under the Constitution. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and may not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *see id.* at 1021 (reversing certification of nationwide classes).

Nationwide class actions tend to steamroller such differences in state policies and laws and to replace "experimentation" by the states with a decision by a single jury, to the detriment of the federal system and the ability of the states to develop their law and make their own policy decisions. As Justice Brandeis stated:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In assuming jurisdiction over the claims of absent class members nationwide, a state court should take care, in the words of Justice Ginsburg, not to "'imped[e] the States' ability to serve as laboratories for testing solutions to novel legal problems.'" *Smith v. Robbins*, 528 U.S. 259, 275-76 (2000) (alteration in original) (quoting *Arizona v. Evans*, 514 U.S. 1, 9 (1995) (Ginsburg, J., dissenting)).

Full faith and credit requires that a court "fully and fairly consider" whether it has jurisdiction over the parties and matters before it. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 (1982). Principles of comity among the states and respect for co-equal sovereigns counsel some measure of restraint in undertaking to apply and decide the laws of other states. In the context of a nationwide or multi-state class certification, that obligation not only affects the interests of other states in deciding and developing their own laws, but also is essential to assuring that the resulting

judgment will be accorded full faith and credit – a matter in which, as this Court has recognized, a defendant has a substantial and cognizable interest. *See Phillips Petroleum*, 472 U.S. at 805.

A full and fair consideration of whether to certify a multi-state or nationwide class cannot be made without consideration of choice of law, varying state laws and policies and, *amici* submit, the interest of other states in deciding and applying their own laws to the claims at issue. Such state interests should be taken into consideration in determining whether a proposed nationwide or multi-state class action is superior to other available methods for resolving the controversy.

As this Court has recognized, consumer protection issues (as presented in this case) are a fundamental area of state concern. *See BMW*, 517 U.S. at 572, 585. Such issues and the relevant state regulatory variations are also of paramount importance to manufacturers and other businesses. Likewise, issues of insurance, which are of primary importance to the members of NAMIC and PCI, are issues of particular concern to the states. Indeed, the constitutional concerns embodied in the Full Faith and Credit Clause are of heightened importance in the area of insurance. Congress has committed insurance regulation to the states. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. As this Court explained in *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), "[o]ne of the major arguments" for leaving regulation of insurance "to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. That purpose, said the Court, "would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union." *Id.*

By certifying a nationwide class action without regard for varying state laws, a state court arrogates to itself an undue authority over issues affecting residents of other states. This Court should grant review to ensure that the regulatory interests of other states and the interests of the federal system are part of the class certification calculus.

III. THE ARKANSAS SUPREME COURT'S RULING IS FINAL AND MERITS IMMEDIATE REVIEW

The Arkansas Supreme Court held that Arkansas courts need not consider variations in state law before assuming jurisdiction over the claims of millions of absent parties residing and contracting in other states by certifying a class including them as class members. It ruled that the Full Faith and Credit and Due Process Clauses of the United States Constitution do not require a choice of law determination before class certification.

The judgment here is not subject to further review in the state courts and is final within the meaning of 28 U.S.C. § 1257(a). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-81 (1975); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984). Like the petitioner in *Cox Broadcasting*, GM "may prevail at trial on nonfederal grounds," but the massive trial of the claims of GM vehicle owners nationwide should not take place as now contemplated. *See Cox Broadcasting*, 420 U.S. at 485; *see also id.* at 477-78 ("[I]mmediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'") (citation omitted).

The important federal constitutional issues raised by this case will almost certainly escape review unless this Court reviews them now. A case such as this is very unlikely to reach this Court after a nationwide class trial, because settlement pressure is likely to be irresistible. *See Bridgestone/Firestone*,

288 F.3d at 1015-16 ("Aggregating millions of claims . . . makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable . . . .").[5] Moreover, even if *this* case were tried and appealed and if GM does not prevail on nonfederal grounds, a later correction of the class certification decision in this case will not undo the substantial harm to GM that would be caused by the expense and burden of the enormous class litigation now contemplated by the class certification order.

Also relevant in this Court's pragmatic approach to finality is that the issue presented is not one of "peculiarly local concern" to Arkansas. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). Rather, the issue here, whether Arkansas may constitutionally provide a forum for the claims of residents of *other states* without first considering what law will apply to their claims, is an issue as to which concerns of comity and federalism support granting, not deferring, review. *See Cox*, 420 U.S. at 505-06 (Rehnquist J., dissenting) ("comity and federalism are significant elements of § 1257 finality"). Ordinarily, postponement of this Court's review of state decisions supports "smooth working of our federal system" by minimizing conflicts between state and federal government. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Here, in contrast, postponement will interfere such smooth working by allowing Arkansas to ignore variations in state law and, thereby, to displace the laws of interested States.

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[5] Indeed, the coercive nature of class certification decisions is demonstrated by the fact that the Arkansas Supreme Court appears *never* to have rendered a decision addressing the propriety of class certification in an appeal of a judgment after a class action trial, despite the fact that Arkansas has become a magnet for class actions and that there are several nationwide or multi-state class actions now pending in Arkansas courts.

The decision to ignore state law variation infringes not only the interests of the defendant and the unnamed class members, but also the quasi-sovereign regulatory interests of the states which actually have contacts with the transactions involved in the suit. So, for example, the diverse definitions of "defect" adopted by those states will be displaced by some uniform definition to be adopted by the Arkansas courts for use in the class trial. Displacement of the law of all states interested in a particular transaction infringes those states' regulatory interests, and denies Full Faith and Credit to the laws of the interested states. *See, e.g., BMW,* 517 U.S. at 571-72. Leaving a decision which inevitably must have this effect unreviewed "might seriously erode federal policy," to wit, the Full Faith and Credit Clause policy of preventing one state, lacking any significant interests in a transaction, from displacing the laws of other states that do have such interests. *See Cox Broadcasting,* 420 U.S. at 483. Even if GM ultimately prevailed under whatever definition Arkansas adopts, that would not cure the affront to the interested States whose laws were displaced by that definition. And the risk that GM would settle the case means that the interests of those States might be sacrificed absent immediate review.

This is an issue that "sound judicial administration requires . . . be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Id.* at 506; *cf. Shaffer v. Heitner,* 433 U.S. 186, 195 n.12 (1977) (Delaware Supreme Court's rejection of jurisdictional challenge was final "consistent with the [Court's] pragmatic approach" to finality).

CONCLUSION

The petition for a writ of certiorari should be granted.

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